

BRB No. 01-0648 BLA

ERNESTINE BAILEY)	
(o/b/o and Widow of VIRGIL BAILEY))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
HARMAN MINING 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 Requests for Modification Denying Living Miner's and Survivor's Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, DC, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Requests for Modification Denying Living Miner's and Survivor's Benefits (99-BLA-0849) of Administrative Law Judge Daniel F. Sutton on miner's and survivor's claims filed pursuant to the provisions of Title IV of the

¹ Claimant, Ernestine Bailey, is the widow of Virgil Bailey, the miner, who died on April 24, 1997. Director's Exhibit 174. The miner filed applications for benefits on May 13, 1976, November 24, 1986, and June 9, 1989. Director's Exhibits 1, 61, 102. The widow filed her application for benefits on August 11, 1997. Director's Exhibit 169. Both the miner's and survivor's claims are presently pending.

Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The procedural history of this case is long. Claimant's husband, the miner, filed a claim for benefits under the Act on May 13, 1976. In the first Decision and Order in this case, Administrative Law Judge Howard J. Schellenberg, Jr. adjudicated the miner's claim pursuant to the criteria set forth at 20 C.F.R. Part 727, credited the miner with twenty-six years of qualifying coal mine employment, and found that, notwithstanding that the evidence was insufficient to establish invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a), rebuttal of the presumption was established pursuant to 20 C.F.R. §727.203(b)(2) and (4). Accordingly, benefits were denied. Director's Exhibit 48. The miner appealed and the Board affirmed the denial of benefits. *Bailey v. Harman Mining Co.*, BRB No. 81-0511 BLA (Jan. 11, 1984) (unpub.); Director's Exhibit 54. The miner appealed the Board's decision and the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, affirmed the denial of benefits. *Bailey v. Harman Mining Co.*, No. 84-1176 (4th Cir. Apr. 22, 1986) (unpub.); Director's Exhibit 57.

The miner filed a duplicate application for benefits on November 24, 1986, which the district director treated as a petition for modification because it was filed within one year of the previous denial pursuant to 20 C.F.R. §725.310 (2000).² Director's Exhibit 61. After the district director's denial of modification, Administrative Law Judge Ben L. O'Brien conducted a formal hearing and found that the miner failed to establish modification, and

² The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). In the decision on appeal, the administrative law judge rejected employer's argument that the new regulations would impact the outcome of this case and applied the newly promulgated regulations where applicable. *See* Decision and Order at 5-9.

therefore, denied benefits on May 19, 1989. Director's Exhibit 102.³ The miner appealed this denial to the Board, but also filed a third application for benefits on June 9, 1989. Director's Exhibit 102. Consequently, the Board granted the motion of the Director, Office of Workers' Compensation Programs (the Director) to dismiss the miner's appeal as premature, held that the miner's third application for benefits was a request for reconsideration of Administrative Law Judge O'Brien's decision, and remanded the case to the Office of Administrative Law Judges for further proceedings. *Bailey v. Harman Mining Co.*, BRB No. 89-2268 BLA (Jun. 23, 1993) (unpub. Order); Director's Exhibit 121.

Inasmuch as Administrative Law Judge O'Brien was no longer with the Office of Administrative Law Judges (OALJ), the case was assigned to Administrative Law Judge Richard K. Malamphy on remand. Administrative Law Judge Malamphy reconsidered the case and denied modification pursuant to Section 725.310 (2000). Director's Exhibit 122. Subsequently, the miner appealed both the decisions of Administrative Law Judges O'Brien and Malamphy, which were affirmed on appeal by the Board and the Fourth Circuit court. *Bailey v. Harman Mining Co.*, No. 95-1286 (4th Cir. May 19, 1995) (unpub.); *Bailey v. Harman Mining Co.*, BRB No. 94-3684 BLA (Jan. 30, 1995) (unpub.); Director's Exhibits 131, 137.

On June 16, 1995, the miner filed another request for modification. Director's Exhibit 138. Administrative Law Judge Donald B. Jarvis determined that the miner failed to demonstrate either a mistake in a determination of fact or a change in conditions, and therefore, denied modification. Director's Exhibit 161. The miner died on April 24, 1997. The miner's attorney appealed the case to the Board. Director's Exhibit 174. On appeal, the Board affirmed the denial of modification in the miner's claim. *Bailey v. Harman Mining Co.*, BRB No. 97-1288 BLA (Jun. 9, 1998) (unpub.); Director's Exhibit 168. While the miner's appeal was pending before the Board, however, his widow (claimant) filed a survivor's claim for benefits on October 1, 1997, which was denied by the district director on March 20, 1998. Director's Exhibits 169, 183. On November 6, 1998, claimant sought

³In addition, Administrative Law Judge Schellenberg denied claimant's request for a waiver of overpayment because the miner failed to document his inability to repay the overpayment to the Department of Labor. Director's Exhibit 102. Because the miner was initially found entitled to benefits by the district director, the Black Lung Disability Trust Fund paid the miner temporary benefits totalling \$26,633.80. Director's Exhibits 32, 40.

modification of the denials on both the miner's and survivor's claims. Director's Exhibit 186. After the denial of modification on both the miner's and survivor's claims by the district director, Director's Exhibits 189, 190, the case was transferred to OALJ and assigned to Administrative Law Judge Daniel F. Sutton (administrative law judge), whose decision is the subject of the instant appeal.

Initially, the administrative law judge granted employer's motion to exclude the medical opinion of Dr. Jones on due process grounds because the pathology slides upon which Dr. Jones relied were not available for review by employer and because Dr. Jones was not available for cross-examination. Regarding the merits of the miner's claim, the administrative law judge found that while the newly submitted evidence of record established invocation of the presumption under Section 727.202(a)(1), and that a mistake had, therefore, been made in the previous finding of no invocation, because the evidence rebutted the presumption pursuant to Section 727.203(b)(3), claimant's request for modification of the denial of the miner's claim must be denied. Regarding the survivor's claim, the administrative law judge found that because there was no evidence to establish that pneumoconiosis caused, substantially contributed to, or hastened the miner's death pursuant to Section 718.205(c)(1)-(3), claimant failed to establish that a mistake in a determination of fact had been made on this issue in the previous decision. Accordingly, the administrative law judge denied benefits on both the miner's and survivor's claims.

On appeal, claimant argues that the administrative law judge improperly weighed the medical opinion evidence, particularly in light of the amended regulations, erroneously applied an incorrect standard of rebuttal in considering the miner's claim, and impermissibly excluded the autopsy report of Dr. Jones in his consideration of the survivor's claim. In response, employer contests the administrative law judge's finding that the existence of pneumoconiosis was established and urges affirmance of the denial of modification in both claims. The Director responds only to the administrative law judge's exclusion of Dr. Jones's report, contending that if the Board holds that the administrative law judge erred in excluding the report, this error would be harmless because the administrative law judge stated that even if admitted, Dr. Jones's report would be entitled to little weight due to its many internal inconsistencies and conflicts.⁴

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational,

⁴ We affirm the administrative law judge's findings pursuant to 20 C.F.R. Part 410 and 20 C.F.R. §§727.203(b)(1), (2) and (4) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 16-17.

and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 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).

Claimant first argues that the original 1997 autopsy report of Dr. Joan Coogan is sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a) in the miner's claim by establishing the existence of pneumoconiosis and that Dr. Coogan's autopsy report along with Dr. Jones's opinion are sufficient to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c) in the survivor's claim.

The administrative law judge correctly found that claimant was entitled to the interim presumption at Section 727.203(a)(1) based on Dr. Coogan's autopsy report. Decision and Order at 15; Director's Exhibit 175. Accordingly, the administrative law judge properly determined that the evidence established the existence of simple coal worker's pneumoconiosis and found that claimant had established a mistake in the prior determination that the miner failed to demonstrate invocation of the presumption pursuant to Section 727.203(a). Decision and Order at 15. The administrative law judge, however, went on to deny claimant's request for modification on the miner's claim because claimant failed to show that a mistake in the prior finding of rebuttal at subsection (b)(3) had been made. We reject claimant's argument that Dr. Coogan's autopsy report and Dr. Jones's report are sufficient to establish that the miner's death was due to pneumoconiosis inasmuch as Dr. Coogan's report addresses only the existence of pneumoconiosis, not whether the miner's death was due to pneumoconiosis, 20 C.F.R. §718.205(c); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988), and inasmuch as Dr. Jones's report was excluded and even if considered, could not establish that the miner's death was due to pneumoconiosis for the reasons discussed, *infra*.

Claimant next contends, citing *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), that given the evidence of record, employer cannot rule out a causal relationship between the miner's disability and his coal mine employment pursuant to Section 727.203(b)(3). Specifically, claimant contends that the administrative law judge erred in according greater weight to the opinions of pulmonologists and internists, rather than pathologists in reviewing the autopsy evidence.

In finding that employer established rebuttal of the presumption under Section 727.203(b)(3), the administrative law judge found that while Dr. Green attributed the miner's shortness of breath in part to his coal mine employment, none of the more recent hospital records contained any diagnosis of lung disease or any mention of a respiratory or pulmonary condition due to any cause. In fact, the administrative law judge noted that the only mention of any possible respiratory or pulmonary condition in the new evidence was a brief unexplained reference to lung disease in Dr. Green's undated letter to claimant. Director's

Exhibit 186 at 19; Decision and Order at 16. Thus, the administrative law judge concluded he agreed with Judge Jarvis's conclusion, that "Dr. Castle has more persuasively, and with better support in the underlying objective medical evidence, explained that the Miner's symptoms of exertional dyspnea and shortness of breath were not respiratory or pulmonary in nature but rather were related to the Miner's severe atherosclerotic coronary artery disease, cerebrovascular disease and diabetes mellitus with resultant complications or [sic] retinopathy, neuropathy and nephropathy." Decision and Order at 16.

In light of the administrative law judge's finding, however, that the autopsy evidence established the existence of coal workers' pneumoconiosis, his finding of rebuttal based on the fact that there was no mention of lung disease in the new evidence cannot stand, and the case must be remanded for the administrative law judge to consider the evidence of coal workers' pneumoconiosis in determining whether the presumption has been rebutted at subsection (b)(3). *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *see also Grigg, supra*; *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). Further, in reconsidering the evidence relevant to subsection (b)(3) rebuttal on remand, the administrative law judge must consider the various credentials of the physicians in weighing the credibility of their opinions. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, BLR (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Finally, claimant contends the administrative law judge erred in excluding the autopsy review of Dr. Miles Jones. Claimant argues that the administrative law judge's exclusion of this evidence places an unfair burden on claimant, who was not at fault for the loss of the pathology slides examined by Dr. Jones and, who complied with all employer's requests for access to this information. Rather, claimant contends that the burden for producing the slides should rest with the Department of Labor (DOL) and that there was no showing that employer or the administrative law judge ever attempted to obtain the slides from DOL. Thus, claimant contends that the administrative law judge's exclusion of Dr. Jones's review of the pathology slides is unfair to claimant because it makes claimant responsible for the negligence of DOL.

The administrative law judge found that the medical opinion of Dr. Jones was based upon autopsy slides that were lost, presumably by the district director's office, and that repeated cooperative attempts by both claimant and employer to locate Dr. Jones were unsuccessful. Accordingly, the administrative law judge agreed with employer that the admission of Dr. Jones's report would violate employer's due process rights because the pathology slides were not available to employer for review and Dr. Jones was not available for cross-examination. Decision and Order at 9-10.

It is well established that a party must be provided an opportunity to respond to

medical reports submitted into the record by the opposing party or to cross-examine the physician who prepared the reports. *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). Accordingly, we affirm the administrative law judge's exclusion of the report of Dr. Jones inasmuch as the administrative law judge rationally found that employer was denied the opportunity to have the autopsy slides reviewed by its own medical experts and precluded from cross-examining Dr. Jones by means of deposition or hearing testimony. *See Lewis v. Consolidation Coal Co.*, 15 BLR 1-37 (1991); Decision and Order at 9-10.

Moreover, the administrative law judge found that "even if Dr. Jones's report were not excluded, I would accord it little weight due to the many inconsistencies and internal conflicts correctly identified by Dr. Castle, and I would conclude that it is convincingly outweighed by the credible and probative evidence of record, including the contrary opinions from Drs. Naeye, Castle and Fino." Decision and Order at 17. Thus, based on this reasoning, even if the administrative law judge erred in excluding Dr. Jones's report as claimant contends, any error would be harmless. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1986)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the Decision and Order on Requests for Modification Denying Living Miner's and Survivor's Benefits of the administrative law judge is affirmed in part, 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

BETTY JEAN HALL

Administrative Appeals Judge