BRB No. 01-0713 BLA

OLLIE MULLINS (Widow of WILLIAM E. MULLINS)	)	
Claimant-Respondent	)	
v.	)	
LITTLE JEWELL COAL COMPANY	)	DATE ISSUED:
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 Decision and Order on Remand and the Decision and Order Denying Reconsideration and Reassignment of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals both the Decision and Order on Remand and the Decision and Order Denying Reconsideration and Reassignment (98-BLA-0044) awarding benefits of Administrative Law Judge Pamela Lakes Wood 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).[1] The instant case has a long history and is before the Board on appeal for a fourth time. The lengthy history of the case is set forth in the Board's prior Decision and Order in *Mullins v. Little Jewell Coal Co.*, BRB No. 99-1042 BLA (Oct. 31, 2000)(unpub.) citing the administrative law judge's March 11, 1999 Decision and Order Denying Modification at 2-6. After several appeals and remand orders from the Board, on October 31, 2000, the Board issued a Decision and Order affirming in part and vacating in part the administrative law judge's Decision and Order. *Mullins*, *supra*. In that decision the Board affirmed the administrative law judge's finding that the interim presumption of totally disabling coal workers' pneumoconiosis was invoked at 20 C.F.R. §727.203(a)(1), and that the presumption was not rebutted at 20 C.F.R. §727.203(b)(1), (2) and (4). The Board, however, vacated the administrative law judge's finding that rebuttal was not established pursuant to Section 727.203(b)(3), and remanded the case for further consideration of Dr. Nash's opinion pursuant to that section. Lastly, the Board held that the Department of Labor had not deprived employer of a fair opportunity to mount a meaningful defense in this case and, therefore, declined to transfer liability to the Black Lung Disability Trust Fund.

On remand, the administrative law judge again found that employer failed to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3), and awarded benefits. Decision and Order on Remand at 1-7. Employer filed a Motion to Vacate Decision and Order on Remand to Transfer Case to New Administrative Law Judge. The administrative law judge denied employer's motion because employer presented no basis for reassignment, and reaffirmed her finding that employer failed to establish rebuttal pursuant to Section 727.203(b)(3), and the award of benefits. It is from the administrative law judge's Decision and Order on Remand and the Decision and Order Denying Reconsideration and Reassignment that employer now appeals.

On appeal, employer contends that the administrative law judge erred in finding that rebuttal was not established pursuant to Section 727.203(b)(3). Employer further argues that the Board should remand this case to a different administrative law judge. Neither claimant

[1] 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). The regulations at issue in this case, however, are not affected by the revised regulations. 20 C.F.R. §§725.2, 725.4(a), (d), (e).

nor the Director, Office of Workers' Compensation Programs (the Director), has responded to employer's appeal.

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

Because the claim in the case at bar arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, employer relies upon that court's decision in *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), to argue that the administrative law judge erred in finding that the opinions of Drs. Fino, Garzon, Stewart and Kleinerman did not establish subsection (b)(3) rebuttal, inasmuch as they opined that the miner's total disability was due to cancer. Employer further contends that the administrative law judge erred in according determinative weight to the opinion of Dr. Nash for the same reasons previously rejected by the Board. Thus, employer asserts that the administrative law judge erred in finding that Dr. Nash's opinion was sufficiently reasoned and documented, without addressing those factors that undermined his opinion. Employer also argues that the administrative law judge's refusal to comply with the Board's instructions requires reassignment of this case to another administrative law judge on remand.

In concluding that employer failed to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3), the administrative law judge found that employer failed to rule out any causal connection between the miner's total disability and his coal mine employment. Decision and Order on Remand at 4. Specifically the administrative law judge concluded that her decision was not based on a finding that Dr. Nash's opinion was "particularly well reasoned or persuasive as compared with the other opinions of record," but on a finding that the opinions of Drs. Fino, Garzon, Stewart and Kleinerman, that the miner was totally disabled due to his cancer, did not rule out any contribution by the miner's pneumoconiosis or coal mine employment. Decision and Order On Remand at 4-5. Regarding employer's motion to vacate the previous finding of entitlement and reassign the case to a new administrative law judge, the administrative law judge rejected it because employer failed to show bias against employer or hostility toward its counsel, and reiterated her holding that employer failed to establish rebuttal of the interim presumption by ruling out a causal connection between the miner's coal mine employment and totally disabling respiratory impairment. Decision and Order Denying Reconsideration and Reassignment at 2, 3, 6.

After careful consideration of the administrative law judge's Decision and Order On Remand and Decision and Order Denying Reconsideration and Reassignment, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's decisions are supported by substantial evidence and contain no reversible error. Section 727.203(b)(3) provides that employer establishes rebuttal of the presumption that the miner was totally disabled due to pneumoconiosis at the time of his death if: "The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment...." The administrative law judge correctly applied Fourth Circuit law interpreting subsection (b)(3), holding that "employer must rule out the causal connection between the miner's total disability and his coal mine employment [.]" *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123, 7 BLR 2-72, 2-80 (4th Cir. 1984). The court later explained that the requisite proof "takes one of two forms: a causal connection can be 'ruled out' if positive evidence demonstrates that the miner suffers from no respiratory or pulmonary impairment of any kind, ... or if such evidence explains all of any impairment present and attributes it solely to sources other than coal mine employment." (citation omitted). *Lockhart*, *supra*. Regarding employer's first argument, that the opinions of Drs. Fino, Garzon, Stewart, and Kleinerman are sufficient to establish rebuttal at subsection (b)(3), we disagree. Because the administrative law judge found that these physicians did not find that claimant had no respiratory or pulmonary impairment prior to his death, they did not rule out any contribution by the miner's pneumoconiosis or coal mine employment to his total disability. Further, considering the evidence as a whole, the administrative law judge found the medical opinions of Drs. Young, Shah, Smiddy, Taylor and Kanwal provided varying degrees of support for Dr. Nash's finding, that claimant was totally disabled and that most of his pulmonary problems were due to coal mine employment. Hence, the administrative law judge properly found that the preponderance of the evidence failed to rule out coal mine employment as a factor in the miner's total disability. *Lockhart*, *supra*.

Likewise, regarding employer's argument that the administrative law judge did not comply with the Board's instructions in considering Dr. Nash's opinion on remand, we also disagree. Citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1998), the administrative law judge acknowledged that experts' respective qualifications are important indicators of the reliability of their opinions, and that treating physicians' opinions may not be credited mechanistically to the exclusion of other, relevant medical evidence. Nonetheless, the administrative law judge permissibly found that, even though Dr. Nash had lesser credentials than Drs. Garzon, Fino, Stewart and Kleinerman, Dr. Nash's opinion was important and persuasive because he was the only physician of record to have examined the miner shortly before his death. Decision and Order on Remand at 6. The administrative law judge explained that for this reason Dr. Nash was best able to assess the miner's physical capability and extent of respiratory function prior to death. Decision and Order On Remand

at 5. Accordingly, we hold that the administrative law judge's reasoning complies with the Board's remand instructions. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). Further, contrary to employer's contention, the administrative law judge considered the comments of Drs. Fino and Stewart, invalidating the pulmonary function study relied on, in part, by Dr. Nash, but found that they did not totally invalidate the study and she permissibly determined that Dr. Nash's opinion was still credible. *See Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985). Likewise, contrary to employer's contention, the administrative law judge considered the fact that the x-ray relied on, in part, by Dr. Nash to diagnose the existence of pneumoconiosis was subsequently reread as negative, but nonetheless reasonably found that it did not undermine the credibility of Dr. Nash's opinion because his diagnosis of pneumoconiosis was supported by the weight of the evidence, including autopsy evidence. *See Trumbo v. Director, OWCP*, 17 BLR 1-85 (1993); *see also Worley*, *supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Finally, the administrative law judge provided an exhaustive discussion of Dr. Nash's opinion, fully justifying her finding that it was reasoned and documented, Decision and Order at 6-7. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-176 (4th Cir. 2000). In conclusion, the administrative law judge made clear that the basis for her decision is that "the evidence does not rule out coal mine employment as a factor in the miner's total disability...", not that claimant had established the contrary, nor that Dr. Nash's opinion outweighed all others. Decision and Order On Remand at 7, 4. Thus, because the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, *see Worley, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989), the administrative law judge's finding that employer failed to rebut the presumption at subsection (b)(3) is affirmed. In view of this holding, the issue of reassignment is moot.

Accordingly, the administrative law judge's Decision and Order on Remand and the Decision and Order Denying Reconsideration and Reassignment are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge