BRB No. 98-0119 BLA
Case No. 86-BLA-0799

RUBY SAMMONS (Widow of RICHARD SAMMONS)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
WOLF CREEK COLLIERIES	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER on RECONSIDERATION

Appeal of the Decision and Order on Remand of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen, Chartered), Washington, D.C., for employer.

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

PER CURIAM:

Employer has timely filed a Motion for Reconsideration of the Board's Decision and Order issued on October 6, 1998, in which the Board vacated the administrative law judge's Decision and Order on Remand denying benefits and remanded the case for further consideration of the evidence. *Sammons v. Wolf Creek Collieries*, BRB No. 98-0119 BLA (Oct. 6, 1998)(unpub.). In that decision, the Board vacated the administrative law judge's finding that the evidence is sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3), and remanded the case to the administrative law judge to determine whether it is necessary to reopen the record to provide employer an opportunity to submit new evidence relevant to this finding. Further, although the Board affirmed the

administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b), the Board instructed the administrative law judge that in the event that new evidence is submitted into the record on remand which supports a finding that the miner suffered from complicated pneumoconiosis, that the miner suffered from a totally disabling respiratory impairment or that the miner's death was due to pneumoconiosis, he must reconsider entitlement to benefits thereunder. Lastly, the Board, citing 20 C.F.R. §718.305, instructed the administrative law judge that, if reached, he must determine whether claimant has established at least fifteen years of coal mine employment. *Sammons v. Wolf Creek Collieries*, BRB No. 98-0119 BLA (Oct. 6, 1998)(unpub.).

In support of its Motion for Reconsideration, employer contends that the Board erred by vacating the administrative law judge's finding that the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). Employer also contends that the Board erred by remanding the case to the administrative law judge for further consideration of the evidence at 20 C.F.R. §718.305. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response to employer's Motion for Reconsideration.

After consideration of employer's contentions, we grant employer's Motion for Reconsideration, but deny the relief requested. Initially, employer contends that the Board erred by vacating the administrative law judge's finding that the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). Specifically, employer asserts that the Board erred by revisiting the issue of rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3), since the Board's previous finding at 20 C.F.R. §727.203(b)(3) constitutes the law of the case, and since the Board has not provided an explanation for finding an exception to the law of the case doctrine. In the Board's most recent decision, the Board correctly noted that it previously indicated that the record contains evidence which, if fully credited, could support employer's burden of establishing rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). However, the Board also correctly noted that upon further review of the record, it appears that none of the medical opinions of record is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3).

The record contains the relevant medical opinions of Drs. Anderson, Broudy, Lane, Hall, Hodges and Howze. Dr. Anderson opined that the miner did not suffer from a pulmonary disability prior to his death. Director's Exhibits 2, 7. Dr. Broudy opined that the miner did not suffer from coal workers' pneumoconiosis, and that the miner did not suffer from a respiratory impairment or pulmonary disability prior to his death. Employer's Exhibits 1, 6. Dr. Lane, in an October 6, 1987 report, opined that

"on the basis of simple coal workers' pneumoconiosis, although [the miner] might have had mild impairment he would not have had disability." Employer's Exhibit 3. In a subsequent report, Dr. Lane opined that the miner did not suffer from a pulmonary disability prior to his death. Employer's Exhibit 6. Dr. Hall found that the miner's lungs were within normal limits. Director's Exhibit 10. Dr. Hodges opined that the miner did not suffer from a condition of a medical or functional nature that would prevent the efficient performance of his duties. Employer's Exhibit 5. Similarly, Dr. Howze opined that the miner was physically capable of performing the hazardous and/or arduous duties of the position of a coal mine inspector. *Id*.

In *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985), and *Warman v. Pittsburg & Midway Coal Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that the medical opinion evidence must establish that pneumoconiosis played no part in the miner's total disability in order to satisfy the requirements of 20 C.F.R. §727.203(b)(3). Further, in *Warman*, the court held that a finding of no functional disability arising out of coal mine employment is insufficient to support a finding of rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). Therefore since the Board correctly held that none of the medical opinions of record is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3), we reject employer's assertion that the Board erred by revisiting the issue of rebuttable of the interim presumption at 20 C.F.R. §727.203(b)(3) since the Board did not provide an explanation for finding an exception to the law of the case doctrine. *See Warman, supra*; *Gibas, supra*.

Contrary to employer's contention that the Board is precluded from revisiting its prior holding that the record contains evidence which, if fully credited, could support employer's burden of establishing rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3), an appellate body is not prohibited from departing from the doctrine of the law of the case where its prior holding is clearly erroneous and continued application would constitute manifest injustice. *See Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989). Moreover, we reject employer's assertion that the Board erred by vacating the administrative law judge's finding that the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3), and remanding the case to the administrative law judge to determine whether it is necessary to reopen the record to provide employer an opportunity to submit new evidence relevant to this finding. See *Peabody Coal Co. v. White*, 135 F.3d 416, 21 BLR 2-247 (6th Cir. 1998); *Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997).

Next, employer contends that the Board erred by remanding the case to the administrative law judge for further consideration of the evidence at 20 C.F.R. §718.305. Specifically, employer asserts that even if claimant could establish fifteen years of coal mine employment, claimant is precluded from invoking the rebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.305 since the evidence of record is insufficient to establish a totally disabling respiratory or pulmonary impairment. As previously noted, the Board remanded the case to the administrative law judge to determine whether it is necessary to reopen the record to provide employer an opportunity to submit new evidence relevant to the issue of rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). Hence, inasmuch as new evidence may be submitted on remand which could support a finding that the miner suffered from a totally disabling respiratory impairment, and thus, support invocation of the rebuttable presumption at 20 C.F.R. §718.305, the Board correctly instructed the administrative law judge to determine whether claimant has established at least fifteen years of coal mine employment, if reached. *See* 20 C.F.R. §718.305*; Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989). Therefore, we reject employer's assertion that the Board erred by remanding the case to the administrative law judge for further consideration of the evidence at 20 C.F.R. §718.305.

Finally, employer, citing *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), contends that the delays by the Department of Labor (DOL) in notifying it of the instant survivor's claim constitute a violation of its due process rights and justify the imposition of liability for benefits on the Black Lung Disability Trust Fund (Trust Fund). In *Lockhart*, the miner filed a claim for benefits on June 10, 1975, which the DOL denied on November 18, 1976, April 28, 1980 and June 24, 1981. On July 15, 1981, the miner filed a timely request for a hearing. However, no responsible operator was named by the DOL when the case was transferred to the Office of Administrative Law Judges (OALJ), notwithstanding the requirements of 20 C.F.R. §725.410(d).[1] On August 12, 1986, the DOL moved to remand the case to the district director to name a responsible operator, and the administrative law judge granted the DOL's motion on October 3, 1986.[2] Although the DOL notified three potentially responsible operators of the claim

[1]The court observed that, under its own regulations, the Department of Labor (DOL) may forgo notifying the responsible operator in a Part 727 case until, and unless, an initial finding of eligibility is made by a district director, 20 C.F.R. §725.412, or the claim is initially denied and the claimant requests a formal hearing, 20 C.F.R. §725.410(d).

[2]The court observed that Lane Hollow was one of three potential operators

on April 26, 1991, Lane Hollow Coal Company (Lane Hollow) was not notified of the claim until April 6, 1992, seventeen years after it could have been notified and eleven years after the regulations command that it be notified. The miner died on December 12, 1989. Inasmuch as the DOL could have notified Lane Hollow of the claim before the miner died, the DOL's delay precluded employer from having the miner examined. Hence, the United States Court of Appeals for the Fourth Circuit held that Lane Hollow was denied due process because the DOL's inexcusable delay in notifying it of the claim deprived it of the opportunity to mount a meaningful defense to the proposed deprivation of its property. The court reasoned that the problem was not that the miner died before notice was given to Lane Hollow, but rather that the miner died many years after such notice could and should have been given, which deprived Lane Hollow of the opportunity to mount a meaningful defense.[3]

The facts in the instant case, which arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, are distinguishable from the facts in *Lockhart*. Here, the miner died on March 11, 1976. Director's Exhibits 1, 8. Claimant filed her survivor's claim on April 14, 1976, Director's Exhibit 1, which the DOL denied on March 23, 1979. On April 15, 1980, the DOL issued a Notice of Initial Finding that claimant was entitled to benefits, which did not list employer as the responsible operator. Director's Exhibit 13. However, on March 12, 1984, the DOL issued a Revised Notice of Initial Finding, which listed employer as the responsible operator. Director's Exhibit 22. Employer challenged the award of benefits, Director's Exhibit 23, and the district director reversed the initial finding of entitlement to benefits on September 20, 1985, Director's Exhibit 30. Claimant requested a hearing on September 26, 1985, and the case was transferred to the OALJ.[4] Director's Exhibit 31.

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named in the DOL's motion.

[3]The court stated that "[t]he government's grossly inefficient handling of the matter-and not the random timing of death-denied Lane Hollow the opportunity to examine [the miner]." *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807, 21 BLR 2-302, 2-319 (4th Cir. 1998).

[4]On November 21, 1988, Administrative Law Judge Lawrence E. Gray issued a Decision and Order denying benefits, which the Board affirmed in part and vacated in part, and remanded the case for further consideration. *Sammons v. Wolf Creek Collieries*, BRB No. 88-4342 BLA (Dec. 5, 1990)(unpub.). Further, the Board granted employer's Motion for Reconsideration, but denied the request for *en banc* reconsideration as well as the request for relief. *Sammons v. Wolf Creek Collieries*, BRB No. 88-4342 BLA (Feb. 5, 1992)(unpub.). On the first remand, Judge Gray

issued a Decision and Order on Remand awarding benefits on December 21, 1993, which the Board affirmed in part and vacated in part, and remanded the case for further consideration. *Sammons v. Wolf Creek Collieries*, BRB No. 94-0643 BLA (Nov. 25, 1994)(unpub.). In addition, the Board denied the Director's request for reconsideration. *Sammons v. Wolf Creek Collieries*, BRB No. 94-0643 BLA (Aug. 16, 1996)(unpub.). On the second remand, the case was reassigned to Administrative Law Judge Robert L. Hillyard who issued a Decision and Order on Remand denying benefits. The Board vacated Judge Hillyard's decision and remanded the case for further consideration. *Sammons v. Wolf Creek Collieries*, BRB No. 98-0119 BLA (Oct. 6, 1998)(unpub.).

Although the DOL did not notify employer of the survivor's claim when claimant was initially awarded benefits, 20 C.F.R. §725.412, the DOL's delay in notifying employer of the claim did not deprive employer of its opportunity to obtain evidence with respect to the cause of the miner's death. As previously noted, the miner died before claimant filed her claim. Moreover, the DOL notified employer of the claim before the case was transferred to the OALJ for a formal hearing on the merits. *Director, OWCP v. Ogelbay Norton Co.*, 877 F.2d 1300, 12 BLR 2-357 (6th Cir. 1989). Thus, we are not persuaded by employer's contention that the delays by the DOL in notifying employer of the instant survivor's claim constitutes a violation of its due process rights and justifies the imposition of liability for benefits on the Trust Fund.

Accordingly, the relief requested by employer is denied and the Board's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge