BRB No. 99-1029 BLA

GEORGE JUDE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELKAY 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 - Denial of Benefits on Remand from the Benefits Review Board of Paul H. Teitler, Administrative Law Judge, United Sates Department of Labor.

Leonard Slayton, Inez, Kentucky, for claimant.

Kathy L. Snyder (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits on Remand from the Benefits Review Board (84-BLA-1029) of Administrative Law Judge Paul H. Teitler 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*.[1] The

[1]Claimant is George Jude, the miner, who filed an application for benefits with the Department of Labor on October 21, 1977. Directors Exhibit 1.

relevant procedural history of this claim is as follows: Claimant filed an application for benefits with the Department of Labor on October 21, 1977. Director's Exhibit 1. Following a hearing, Administrative Law Judge Thomas W. Murrett issued a Decision and Order awarding benefits dated June 4, 1986. The Board affirmed the administrative law judge's finding of entitlement pursuant to the regulations set forth in 20 C.F.R. Part 727, but remanded the case to the administrative law judge for him to recalculate the date of the onset of disability, and thus, of entitlement. *Jude v. Elkay Mining Co.*, BRB No. 86-2833 BLA (Mar. 30, 1990)(unpub.). The Board denied employer's motion for reconsideration in an Order dated January 3, 1991. *Jude v. Elkay Mining Co.*, BRB No. 86-2833 BLA (Jan. 3, 1991)(unpub. Order). Employer then filed an appeal with the United States Court of Appeals for the Fourth Circuit. The court dismissed the appeal as interlocutory and the case was remanded to the administrative law judge. *Jude v. Elkay Mining Co.*, No. 91-2235 (4th Cir. Aug. 19, 1991)(unpub. Order). On remand, Administrative Law Judge Paul H. Teitler awarded benefits under Part 727, with an onset date of September 1, 1982. Employer appealed to the Board and claimant filed a cross-appeal.

The Board held that employer's arguments with regard to rebuttal of the interim presumption pursuant to 20 C.F.R. § 727.203(b)(3)were without merit, as the Board's prior holdings constituted the law of the case. The Board again affirmed the determination as to claimant's entitlement to benefits, thus denying employer's appeal, but vacated the administrative law judge's finding with regard to the onset date and remanded the case to the administrative law judge. *Jude v. Elkay Mining Co.*, BRB Nos. 93-0247 BLA and 93-0247 BLA-A (July 7, 1994)(unpub.).

On remand, the administrative law judge found that the appropriate date for the onset of disability and entitlement was November 1, 1985, in a Decision and Order dated April 11, 1995. Following employer's third appeal, and claimant's second cross-appeal, the Board reconsidered its previous holding with regard to rebuttal pursuant to subsection (b)(3), and held that employer's contentions had merit. The Board affirmed, however, administrative law judge's finding with regard to the onset date, should he find claimant entitled to benefits on remand. Thus, the Board remanded the case to the administrative law judge to reconsider subsection (b)(3) rebuttal. *Jude v. Elkay Mining Co.*, BRB Nos. 95-1427 BLA and 95-1427 BLA-A (June 28, 1996)(unpub.).

Following remand, the administrative law judge reopened the record and received additional evidence. The administrative law judge held that the evidence was insufficient to establish rebuttal at subsection (b)(3), and thus, he awarded benefits in a Decision and Order dated March 19, 1997. Employer then

filed its fourth appeal and claimant filed his third cross-appeal with the Board. The Board vacated the administrative law judge's finding at subsection (b)(3) and again remanded the case to the administrative law judge. With regard to claimant's cross-appeal, the Board rejected claimant's arguments regarding the onset date, on the ground that its prior affirmance of the administrative law judge's finding constituted the law of the case. The Board also noted that rebuttal pursuant to subsection (b)(3) precludes entitlement at 20 C.F.R. Part 410, Subpart D. *Jude v. Elkay Mining Co.*, BRB Nos. 97-0949 BLA and 97-0949 BLA-A (March 5, 1998)(unpub.), slip op. at 5, n.3, *citing Pastva v. The Yoghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). On remand, the administrative law judge found that the evidence was sufficient to establish rebuttal pursuant to subsection (b)(3) and he denied benefits in a Decision and Order dated June 15, 1999. Claimant then filed the instant appeal with the Board.

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).

Claimant initially asserts that the administrative law judge did not properly consider the opinion of Dr. Rasmussen, which claimant contends is sufficient to preclude rebuttal at subsection (b)(3). We disagree. The administrative law judge rationally found that Dr. Rasmussen's opinion was entitled to less weight because he did not adequately document his findings. Decision and Order at 6; *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). In addition, the administrative law judge noted that Dr. Rasmussen was not as qualified as Drs. Zalvidar and Fino, who are both Board-certified in pulmonary medicine and internal medicine, while Dr. Rasmussen is Board-certified in only internal medicine. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Moreover, the administrative law judge acted within his discretion in giving little weight to Dr. Rasmussen's opinion because it is equivocal. The administrative law judge's finding is rational and supported by substantial evidence, as Dr. Rasmussen did not state conclusively that pneumoconiosis contributed to claimant's impairment, but rather commented that claimant's

impairment "could readily be attributed to coal mine employment," that it was "medically reasonable" to conclude that claimant has occupational pneumoconiosis, and that "it is reasonable to conclude" that claimant is totally disabled due to a number of factors, including pneumoconiosis. Claimant's Exhibits 1, 2; Decision and Order at 4-5; *see Justice v. Island Creek Coal Co.,* 11 BLR 1-91 (1988); *Campbell v. Director, OWCP,* 11 BLR 1-16 (1987). We affirm, therefore, the administrative law judge's determination to discount Dr. Rasmussen's opinion.

Claimant also argues that the administrative law judge erred by crediting the opinions of Drs. Zalvidar and Fino. This contention is without merit. The administrative law judge correctly noted that both Drs. Zalvidar and Fino opined that while claimant suffered from pneumoconiosis, he was totally disabled due to non-respiratory causes. Dr. Fino attributed claimant's condition to age and heart disease, while Dr. Zalvidar opined that claimant's total disability was due to obesity and hypertension. Employer's Exhibits 1-3; Decision and Order at 5-6. The administrative law judge rationally credited the opinions of Dr. Fino and Zalvidar on the ground that they were better supported by the objective data of record, based upon the results of the pulmonary function studies and the blood gas studies. *See Cochran v. Director, OWCP,* 16 BLR 1-101 (1992); *McMath, supra*; *Wetzel*, *supra*. The administrative law judge also reasonably relied upon the fact that Drs. Fino and Zaldivar possess credentials which are superior to Dr. Rasmussen's. Decision and Order at 6; *see Worhach*, *supra*; *Clark*, *supra*; *Trent*, *supra*. Further, the administrative law judge correctly noted that Dr. Fino's examination was the most recent of record. Decision and Order at 6; *see Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *McMath, supra*; *Wetzel, supra.*

We also reject claimant's contentions regarding the discrepancies in the pulmonary function studies obtained by Dr. Fino with respect to claimant's height and the predicted values that he used to assess the degree of claimant's impairment. Employer's Exhibits 1, 2. Inasmuch as claimant did not raise the issue of the alleged flaws in Dr. Fino's pulmonary function studies before the administrative law judge, the Board will not address this issue on appeal. *See Orek v. Director, OWCP*, 10 BLR 1-51 (1987).

In addition, we reject claimant's contention that Dr. Fino's opinion is hostile to the Act because the doctor concluded that simple pneumoconiosis will not cause a totally disabling respiratory impairment. A medical opinion is deemed contrary to the spirit of the Act if the doctor forecloses all possibility that simple pneumoconiosis can be totally disabling. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Butela v. United States Steel Corp.*, 8 BLR 1-48 (1985).

Dr. Fino testified at his deposition that claimant had category one pneumoconiosis, based upon x-ray. However, Dr. Fino stated that he "would predict that [claimant] would probably have normal lung function, although I have seen individuals who don't, but the majority of individuals with simple pneumoconiosis will have normal lung function." Employer's Exhibit 2 at 24-25. Later, on cross-examination, Dr. Fino responded "yes" to the question of whether simple pneumoconiosis can cause a totally disabling pulmonary impairment. *Id.* at 33-34. In addition, Dr. Fino reiterated his position that a minority of patients with category one pneumoconiosis will have a totally disabling impairment. *Id.* at 38-40. This testimony does not constitute an opinion that simple pneumoconiosis cannot be totally disabling and is, therefore, inconsistent with claimant's contention that Dr. Fino's opinion is hostile to the Act. *See Aimone v. Morrison Knudsen Co.*, 8 BLR 1-32 (1985); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); *Cunningham v. Pittsburg and Midway Coal Co.*, 7 BLR 1-93 (1984). Thus, we reject claimant's contentions with regard to the opinions of Drs. Zalvidar and Fino and affirm the administrative law judge's determination that the evidence is sufficient to establish rebuttal of the interim presumption pursuant to subsection (b)(3). *See Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). We affirm, therefore, the administrative law judge's denial of benefits.[2]

[2]It is unnecessary to address claimant's contentions with regard to the administrative law judge's findings with respect to the appropriate onset date, as they are rendered moot by the our disposition of the case. *See Cochran v. Director, OWCP*, 16 BLR 1-101 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits on Remand from the Benefits Review Board is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge