[BLR cite: *Bates v. Creek Coal Co.*, 18 BLR 1-1 (1994)]

BRB No. 85-1800 BLA

RAY BATES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CREEK COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order Upon Reconsideration of John C. Bradley, Administrative Law Judge, United States Department of Labor.

Robert G. Miller, Jr. (Perry & Preston), Paintsville, Kentucky, for claimant.

Laura Montgomery (Arter & Hadden), Washington, D.C., for employer/carrier.

Jeffrey S. Goldberg (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, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier appeals the Decision and Order and subsequent Decision and Order Upon Reconsideration (80-BLA-6667) of Administrative Law Judge John C. Bradley 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). Claimant filed his claim for benefits on May 9, 1979, Director's Exhibit 1, and was initially denied benefits on September 17, 1979. Director's Exhibit 28. Upon claimant's request dated July 1, 1980, the claim proceeded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 29, 36. Prior to the hearing, the district director[1] named Creek Coal Company (CCC) as the putative responsible operator. Director's Exhibit 36. A hearing was held on May 14, 1981, before Administrative Law Judge Jeffrey Tureck. Administrative Law Judge's Exhibit 1. At that hearing Old Republic Insurance Company (carrier, Old Republic) raised

[1] The district director was formerly titled the deputy commissioner. *See* 20 C.F.R. §725.101(a)(11); 55 *Fed. Reg.* 28606 (July 12, 1990).

a coverage issue, contending that the insurance policy at issue was only for covered employees, and not for an owner of a coal company. Judge Tureck noted that CCC had been out of business since approximately October of 1977, and thus, remanded the case to the district director for admission of additional evidence and further review of the responsible operator issue. Director's Exhibit 39.

After both parties submitted additional evidence, the Department of Labor issued a letter dated November 17, 1981, stating that it "believe[s] that both Creek Coal Company and Old Republic Insurance Company have been properly designated as liable parties." Director's Exhibit 42. The claim was then referred to the Office of Administrative Law Judges on April 8, 1982, for another hearing. Director's Exhibit 43. The second hearing was held on July 17, 1984, before Administrative Law Judge John C. Bradley (the administrative law judge), which resulted in the issuance of a Decision and Order dated March 8, 1985. Judge Bradley found that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), and insufficient to establish rebuttal under 20 C.F.R. §727.203(b). Accordingly, benefits were awarded. As to the responsible operator issue, Judge Bradley concluded that since claimant worked for Creek Coal Company, Incorporated (CCI, employer), for only two months, the wrong responsible operator had been named, and thus, designated the Black Lung Disability Trust Fund (Trust Fund) liable, if, on remand, the district director found no other responsible operator.[2] Decision and Order at 9. On April 5, 1985, the Director, Office of Workers' Compensation Programs (the Director), filed a motion for reconsideration of Judge Bradley's Decision and Order in light of his responsible operator finding.[3] On June 26, 1985, Judge Bradley issued a Decision and Order upon Reconsideration finding CCI, as successor operator to CCC, and Old Republic, as carrier to both companies, liable for benefits.

On July 25, 1985, employer/carrier appealed to the Board. A petition for review was filed on September 3, 1985,[4] challenging the administrative law judge's finding that the employer/carrier is liable for benefits. "[I]n light of the many changes in the law which have taken place since the original decisions were issued," the Board, by order dated March 11, 1993, permitted a supplemental briefing period. Employer/carrier, the Director and claimant submitted supplemental briefs. In its supplemental brief employer/carrier challenges the administrative law judge's responsible operator finding and his finding that the evidence is insufficient to establish rebuttal at Section 727.203(b)(3). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's finding that Old

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[2] In response to this decision Creek Coal Company, Incorporated and Old Republic Insurance Company, filed an appeal with the Board dated March 19, 1985, in order to preserve their rights, if, on remand, the district director found them liable for benefits. The record establishes that this notice of appeal was received by the Board on March 29, 1985. In light of the motion for reconsideration filed with Judge Bradley by the Director, Office of Workers' Compensation Programs, on April 5, 1985, the Board dismissed employer/carrier's appeal as premature. *Bates v. Creek Coal Co.*, BRB No. 85-745 BLA (Aug. 5, 1985)(unpub. order).

[3] The Director alleged that CCI was the successor operator to CCC.

[4] At the same time, employer/carrier sought to have this case consolidated with the case of *Lester v. Four L. Coal Co.*, BRB No. 84-1023 BLA, since both involved Old Republic, however, the Board denied this request by Order dated February 28, 1986. *Lester v. Four L. Coal Co.*, BRB No. 84-1023 BLA and *Bates v. Creek Coal Co.*, BRB No. 85-1800 BLA (Feb. 28, 1986)(unpub. order).

Republic, as carrier for CCC and CCI, is liable for benefits.[5] Claimant's supplemental response brief urges affirmance of the award of benefits.[6]

The Board's scope of review is limited. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law. 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).

Citing *Williams v. Humphreys Enterprises, Inc.*, BLR , BRB No. 88-0111 BLA (May 21, 1993), employer/carrier asserts that the administrative law judge's failure to determine whether primary liability had been established, precluded him from making any successor operator finding. Specifically, employer/carrier asserts that the administrative law judge failed to first determine whether the original responsible operator, CCC, was financially capable of paying benefits, and that therefore, it was improper for the him to engage in a successor operator analysis and consequently, find carrier liable for benefits. The "primary operator" is the most recent employer with which claimant has at least one year of cumulative coal mine employment, at least one day of which must be after December 31, 1969. *See* 20 C.F.R. §725.493. Contrary to employer/carrier's assertion, CCI is not the "successor operator" to CCC, *see* 20 C.F.R. §725.493(a)(3)(i), but rather is, as the reorganized, incorporated version of the sole proprietorship CCC, both owned and operated by claimant and insured by Old Republic, the "primary operator."

[5] The Director, however, noted in his brief that he "will not respond to the carrier's argument concerning rebuttal of the interim presumption." *See* Director's Brief, n. 1 at 2.

[6] Additionally, employer/carrier filed a reply brief, reiterating the arguments made in its brief in support of the petition for review.

The regulations specifically address the issue of reorganization,[7] and the provision in question stands for the proposition that a change in business form, as opposed to a change in substance, *see e.g.* 20 C.F.R. §725.493(a)(3)(ii), (iii), does not discharge the liability of the original entity. 20 C.F.R. §725.493(a)(3)(i). The reorganized entity simply retains its liability for benefits. In the instant case claimant's last coal mine employment was with CCI, and while claimant had only two months of employment with CCI, his actual total employment with the organization is two years and two months. This is due to the fact that the two companies, CCI and CCC, are for the purposes of determining liability for benefits under the Act, one and the same. *See* 20 C.F.R. §725.493(a)(3)(i). CCI did not buy CCC's assets; rather CCC became CCI without interrupting operations. As the Director correctly notes, "the location, employees, and equipment remained constant (Transcript at 18-21)." Director's Brief at 5. Therefore, any liability for benefits that may have been incurred by CCC, the sole proprietorship, were retained by CCI, the incorporated form of that business enterprise. We, thus, find that claimant's two years of employment with CCC merge with his two months of employment with CCI. 20 C.F.R. §725.493(a)(1), (b). Accordingly, we hold that CCI is the "primary operator" by virtue of its status as the employer for which claimant last worked. *See generally Williams, supra*.

[7] The relevant regulation is 20 C.F.R. §725.493(a)(3)(i), which states that:

> If an operator ceases to exist by reason of a reorganization which involves a change in identity, form, or place of business or organization, however effected, the resulting entity shall be treated as the operator to which this section applies.

Employer/carrier also contends that if CCC had been properly named, Old Republic would not be responsible as carrier since Bates never purchased insurance coverage for himself. Specifically, employer/carrier asserts that the insurance policy in question does not provide coverage for an owner of a coal company, particularly where the premium paid was sufficient to cover only one employee.[8] Thus, employer/carrier avers that since claimant paid no premiums on himself, he cannot now ask for coverage, even if CCC had been properly identified as the responsible operator. The record clearly establishes that Old Republic insured both CCC and CCI. Claimant's Exhibit 6. With regard to the issue of insurance coverage the regulations require a rider to be added to all contracts between coal mine operators and insurance carriers. In pertinent part, that rider states:

> (b) Insuring agreement IV(2) is amended to read "by disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the insured, to conditions causing the disease occurs during the policy period, or occurred prior to (effective date) and claim based on such disease is first filed against the insured during the policy period."
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> 20 C.F.R. §726.203(a).

This rider, as the Director suggests, in part, prevents an operator from excluding some employees who act as coal miners from coverage. Thus, all of the operator's coal miners are covered under the obtained policy, as a matter of law. Employer/carrier does not contest claimant's status as a miner, nor does it argue that claimant did not engage in covered employment with both CCC and CCI. We, therefore, affirm the administrative law judge's finding that Old Republic, as carrier for both CCC and CCI, is liable for any benefits to be paid on this claim.[9]

Employer/carrier next asserts that the administrative law judge never "said what rebuttal provisions he considered," and "never explained why he found the objective non-qualifying laboratory data insufficient to rebut the interim presumption," Employer/Carrier's Supplemental Brief at 11, and thus, his analysis fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Employer/carrier

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[8] Employer/carrier explains that the policies condition coverage on payment of premiums. Carrier further notes that claimant's tax form shows salaries, excluding what he paid himself, of $ 33,703.84, which amounts approximately to a monthly payroll of $ 2,808.65. Carrier maintains that the premium paid to Old Republic was computed on a payroll of $ 1,631.00, which "hardly pays for one employee, much less two employees, Bates' own salary and his share of the net profits of over $ 120,000.00 in 1977." While carrier may be correct that claimant, as employer, underpaid his premiums, Old Republic never cites to any provision of the insurance contract setting forth how the premiums are to be calculated. Furthermore, if claimant underpaid his premiums to Old Republic or provided false information regarding the amount of employees to be covered by the policy, Old Republic may have a cause of action in civil court against claimant. Claimant's actions, though, do not shield Old Republic from liability as the carrier for CCI and CCC.

[9] Employer/carrier also asserts that the evidence establishes that CCC is financially capable of assuming liability for this claim, and thus, since claimant was the owner of CCC he owes any benefits to himself. In light of our affirmance of the administrative law judge's finding that Old Republic is liable for benefits, we need not address this contention.

also asserts that the administrative law judge should have addressed the issue of causation at 20 C.F.R. §727.203(b)(3), particularly in light of the fact that the record contains proof of claimant's smoking history.[10]

[10] The administrative law judge's rebuttal findings are as follows:

> It has been established that claimant is a recipient of the munificence embodied in the §727.203(a) presumption. The record does not contain evidence which rebuts the presumptions. Of the two valid vent studies, one is qualifying and another performed some 6 months later is non-qualifying, although the MVV value of 76.8 is below the §727.203 standard and apparently induced Dr. O'Neill to find "moderate small airways obstructive disease."
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> The 2 blood gas studies are non-qualifying, but I do not believe such evidence suffices to rebut. The medical reports provide no basis for concluding that any of the 4 subsection 203(b) criteria have been met.
>
> Weighing all the evidence of record I conclude that there is no evidentiary basis for rebutting the presumption.
>
> Decision and Order at 9.

We note that while the administrative law judge's findings regarding rebuttal fail to fully comply with the APA, that error is harmless, since the evidence of record[11] is insufficient as a matter of law to establish rebuttal pursuant to Section 727.203(b). *Farber v. Island Creek Coal Co.*, 7 BLR 1-428 (1984); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). First, since claimant is no longer working, Transcript at 15, rebuttal cannot be established pursuant to 20 C.F.R. §727.203(b)(1). *See* 20 C.F.R. §727.203(b)(1). Additionally, the administrative law judge's finding of invocation pursuant to Section §727.203(a)(1) precludes employer/carrier from establishing rebuttal at 20 C.F.R. §727.203(b)(4). *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), n. 26, *reh'g den.* 484 U.S. 1047 (1988); *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988). With regard to 20 C.F.R. §727.203(b)(2), employer/carrier must establish that the miner is not disabled for **whatever** reason. *York v. Benefits Review Board*, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987). Inasmuch as the credible medical reports of record are insufficient to establish that the miner is not disabled, and the two non-qualifying blood gas studies and one non-qualifying pulmonary function study are not sufficient, in and of themselves, to establish rebuttal by showing claimant's ability to do his usual coal mine work, *see Patellos v. Director, OWCP*, 7 BLR 1-661 (1985); *Conley v. Roberts and Schaefer Co.*, 7 BLR 1-309 (1984), employer/carrier cannot establish rebuttal at Section 727.203(b)(2). *See* 20 C.F.R. §727.203(b)(2); *York, supra*.

In order to establish rebuttal at Section 727.203(b)(3), employer/carrier must show that pneumoconiosis played no part in causing the miner's disability. *See Warman v. Pittsburg & Midway Coal Mining Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988). Initially, the medical opinion of Dr. O'Neill is insufficient to establish rebuttal at Section 727.203(b)(3), since it is silent concerning whether claimant's moderate chronic small airways obstructive disease arose out of his coal mine employment. *See Borgeson v. Kaiser Steel Corp.*, 12 BLR 1-169 (1989)(*en banc*). Additionally, Dr. Pellegrini's opinion, diagnosing moderately severe chronic lung disease due to dust exposure from claimant's coal mine employment, cannot establish that claimant's pneumoconiosis played no part in causing his disability. Moreover, inasmuch as Dr. Combs' opinion deals with the extent of disability rather than the source of disability it is insufficient to establish rebuttal at Section 727.203(b)(3). *Warman, supra.* Lastly, the non-qualifying objective studies of record are not determinative of causation, and are on their own, insufficient to establish rebuttal at Section 727.203(b)(3). *See Piniansky v.*

[11] The administrative law judge found that the record contains the medical reports of: Dr. O'Neill, who opined that claimant suffered from coal workers' pneumoconiosis, simple chronic bronchitis, but did not specifically address the issue of disability, Director's Exhibit 35; Dr. Pellegrini, who diagnosed chronic lung disease, moderately severe due to dust exposure from claimant's coal mine employment and opined that claimant should avoid very heavy exertion, Director's Exhibit 23; and the deposition testimony of Dr. Combs, who, based on his x-ray interpretation alone, found nothing that would prevent claimant from engaging in his usual coal mine employment or comparable work, Employer's Exhibit 5.

Director, OWCP, 7 BLR 1-171 (1984). The administrative law judge's finding that employer has failed to establish rebuttal under 20 C.F.R. §727.203(b)(3) is, therefore, affirmed. *See* 20 C.F.R. §727.203(b)(3); *Warman, supra*. We, therefore, affirm the administrative law judge's finding that the evidence is insufficient to establish rebuttal at Section 727.203(b) as supported by substantial evidence, and consequently, affirm the administrative law judge's Decision and Order awarding benefits.

Accordingly, the administrative law judge's Decision and Order and Decision and Order upon Reconsideration awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge