BRB No. 94-0164 BLA

ROY JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OLD BEN COAL 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 [1993] Decision and Order on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, III (Vinyard & Moise), Abingdon, Virginia, for claimant.

Peter C. Palumbo, III (Law Offices of Wayne R. Reynolds, P.C.), Belleville, Illinois, for employer.

Richard A. Seid (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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the [1993] Decision and Order on Remand (81-BLA-9504) of

[1]Claimant is Roy Johnson, the miner, who filed his Part C application for medical benefits on October 24, 1978. Director's Exhibit 1; [1993] Decision and Order on Remand at 1. Claimant had filed a Part B application for benefits with the Social Security Administration; Social Security Administration Administrative Law Judge E. Carter Botkin awarded benefits on that claim in a Decision and Order dated November

6, 1975. Director's Exhibit 10.

Administrative Law Judge Thomas M. Burke denying benefits on a medical benefits 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). This case is before the Board for the fourth time. The procedural posture of this case is as follows. Initially adjudicating this claim pursuant to the criteria set forth at 20 C.F.R. Part 727, Administrative Law Judge Robert J. Brissenden credited claimant with twenty-six years of qualifying coal mine employment, Decision and Order at 2, and found that Old Ben Coal Company was the responsible operator, Decision and Order at 2, that claimant failed to establish invocation of the interim presumption pursuant to Section 727.203(a), Decision and Order at 4-7, and failed to establish entitlement pursuant to 20 C.F.R. Part 410, Subpart D, Decision and Order at 7. Accordingly, benefits were denied. Claimant appealed the denial and the Board reversed the administrative law judge's finding under Section 727.203(a)(1) and held that, as a matter of law pursuant to the holding in *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424, 8 BLR 2-109 (4th Cir. 1986), *rev'd sub nom. Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988), invocation under Section 727.203(a)(1) had been established in this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); *see also Hon v. Director, OWCP*, 699 F.2d 441, 5 BLR 2-43 (8th Cir. 1983). Furthermore, the Board remanded the case for the administrative law judge to consider the evidence relevant to rebuttal pursuant to Section 727.203(b). *Johnson v. Old Ben Coal Co.*, BRB No. 84-1594 BLA, *slip op.* at 2 (Jul. 15, 1986)(unpub.).

Notwithstanding the Board's holding that invocation had been established, on remand the administrative law judge found invocation established pursuant to Sections 727.203(a)(1) and (a)(3), but also determined that the evidence was sufficient to establish rebuttal at Section 727.203(b)(2). [1986] Decision and Order on Remand at 3-7. The administrative law judge further found that rebuttal under subsection (b)(2) precluded entitlement pursuant to Part 410, Subpart D. [1986] Decision and Order on Remand at 7. Accordingly, benefits were again denied. Claimant appealed that decision and the Board reversed the administrative law judge's finding pursuant to Section 727.203(b)(2), holding that, as a matter of law, there is no evidence of record sufficient to establish subsection (b)(2) rebuttal pursuant to *Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987). The Board remanded the case, however, for the administrative law judge to consider the reports of Drs. O'Neill, Castle and Renn pursuant to Section 727.203(b)(3). *Johnson v. Old Ben Coal Co.*, BRB No. 87-0217 BLA, *slip op.* at 2-3 (Aug. 29, 1988)(unpub.).

Applying the Section 727.203(b)(3) rebuttal standard articulated in *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), the administrative law judge determined that the opinions of Drs. O'Neill, Castle and Renn were insufficient to establish rebuttal because these non-examining physicians addressed matters not addressed by Dr. Buddington, an examining physician. Hence, he awarded benefits. [1988] Decision and Order on Remand at 2-3. Employer timely appealed the award of benefits and the Board vacated the administrative law judge's Section 727.203(b)(3)

finding based on the Board's conclusion that the administrative law judge had erroneously discredited the reports of Drs. O'Neill, Castle and Renn because they did not examine claimant and they addressed matters that were not addressed by an examining doctor; the Board further held that the administrative law judge impermissibly found the physicians' opinions to be "speculative." *Johnson v. Old Ben Coal Co.*, 17 BLR 1-5, 1-7-8 (1992).[2] Furthermore, the Board distinguished this case from *Turner v. Director, OWCP*, 927 F.2d 778, 15 BLR 2-6 (4th Cir. 1991), based on the conclusion that the non-examining physicians' reports in the instant case addressed matters that had been adequately addressed by an examining physician.[3] *Johnson*, 17 BLR at 1-7 n.1.

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[2]In addition, the Board noted that, because Dr. Castle did not "rule out" claimant's coal mine employment as a contributing cause of claimant's disability, his medical opinion is legally insufficient to establish rebuttal pursuant to Section 727.203(b)(3). *See Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Phillips v. Jewell Ridge Coal Co.*, 825 F.2d 408, 10 BLR 2-160 (4th Cir. 1987) (table).

[3]In its 1992 Decision and Order, the Board specifically held, "Inasmuch as Dr. Buddington recorded a twenty pack-year smoking history for claimant in his medical report, *see* Director's Exhibit 8, and as the non-examining physicians reviewed, *inter alia*, Dr. Buddington's report when arriving at their own conclusions, *see* Employer's Exhibits 1-3, we hold that the record reflects that the reviewing physicians based their

Upon third remand, Administrative Law Judge Thomas M. Burke[4] found that the evidence is sufficient to establish rebuttal pursuant to Section 727.203(b)(3) based on the medical opinions of Drs. O'Neill and Renn and, accordingly, denied benefits. [1993] Decision and Order on Remand at 6-7. Claimant timely filed the instant appeal.

On appeal, claimant argues that the administrative law judge's Section 727.203(b)(3) finding is not supported by substantial evidence since Dr. Buddington, an examining physician, did not consider cigarette smoking as a cause of claimant's disability, and thus the opinions of non-examining physicians Drs. Renn and O'Neill are insufficient as a matter of law to support rebuttal based on smoking as the cause of claimant's disability. Claimant's Brief at pp. 4-8 (unpaginated). Employer responds, urging affirmance of the denial. Employer's Brief at 5-7. The Director, Office of Workers' Compensation Programs, (the Director) as party-in-interest, responds, submitting that *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994), rendered subsequent to the Board's 1992 decision in this case, construes the restriction on non-examining physicians' opinions that was originally articulated in *Massey*, and indicates that reliance on the non-examining doctors' opinions that

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respective opinions on matters sufficiently addressed by the examining physician." *Johnson*, 17 BLR at 1-7.

[4]Administrative Law Judge Thomas M. Burke rendered the 1993 decision inasmuch as Administrative Law Judge Brissenden was no longer with the Office of Administrative Law Judges. Claimant objected to the substitution of another administrative law judge and requested that Administrative Law Judge Brissenden "be requested to come back on a temporary basis to decide the case." [1993] Decision and Order on Remand at 3; *see generally Edmiston v. F & R Coal Co.,* 14 BLR 1-65 (1990). On June 21, 1993, Associate Chief Administrative Law Judge James L. Guill denied claimant's request inasmuch as such a request is "impractical" and, furthermore, claimant failed to demonstrate a legal basis for such a request. Order of June 21, 1993 at 1-2.

cigarette smoking caused claimant's lung condition in this case, an issue not addressed by the examining physician of record, is precluded. Director's Brief at 2-4.

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, 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The sole issue on appeal is whether the administrative law judge's rebuttal finding pursuant to Section 727.203(b)(3) complies with the standard pronounced by the United States Court of Appeals for the Fourth Circuit. *See, Massey*, *supra*; *Turner, supra; Malcomb, supra; see also Cox v. Shannon-Pocahontas Mining Co.*, 6 F.3d 190, 18 BLR 2-31 (4th Cir. 1993); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); discussion *infra*. Claimant contends specifically that the administrative law judge erred in relying on the opinions of non-examining physicians Drs. O'Neill and Renn, urging that their opinions that claimant's cigarette smoking caused his pulmonary condition are insufficient as a matter of law to establish rebuttal because Dr. Buddington, an examining physician, did not opine that cigarette smoking was the cause of claimant's pulmonary disease. Claimant's Brief at pp. 4-6 (unpaginated). Claimant thus disagrees with the Board's previous conclusion that Dr. Buddington had sufficiently addressed cigarette smoking as a causative factor as required by the *Massey* and *Turner* decisions. Moreover, claimant argues that the opinions of Drs. O'Neill and Renn are unreasoned and "speculative in nature" since both found that claimant does not have a pulmonary impairment, a conclusion that is inconsistent with the qualifying blood gas studies of record.[5] Claimant's Brief at pp. 6-7 (unpaginated). Employer responds to claimant's contention, urging that the Board has previously held that *Turner* is distinguishable from the facts in the instant case and that such holding constitutes the law of the case and may not be disturbed. Employer's Brief at 5-6. In the alternative, employer argues that the opinions of Drs. Renn and O'Neill "rule out any causal connection between [claimant's] coal mine employment and his presumed disability." Employer's Brief at 6 (emphasis in original). The Director agrees with claimant concerning the *Massey* restriction on the opinions on non-examining physicians. The Director specifically contends that the decision that was issued by the United States Court of Appeals for the Fourth Circuit in *Malcomb, supra*, constitutes subsequent intervening law, and therefore provides a basis for an exception to the law of the case doctrine, and the Board may now revisit this issue. The Director argues that *Malcomb* construes the *Massey* restriction on the opinions of non-examining physicians to preclude reliance on non-examining physicians' opinions addressing the role of a causal

[5]A review of the record reveals that it contains two qualifying blood gas studies, dated February 15, 1980 and November 19, 1981. Director's Exhibit 8; Claimant's Exhibit 1.

factor where no examining physician has addressed whether the causal factor played a role in the miner's impairment. Director's Brief at 3. Applying *Malcomb* to the case at bar, the Director avers that the mere inclusion of claimant's cigarette smoking history in the medical report of the examining physician in this case, Dr. Buddington, "does not translate into an affirmative opinion on the role of smoking in Johnson's lung disease." Director's Brief at 3.

We agree with the Director that the *Malcomb* decision, issued subsequent to the Board's 1992 decision in this case, provides additional guidance concerning the proper application of the *Massey* restriction on the opinions of non-examining physicians, and that we should therefore revisit that issue. Consequently, we decline to apply the law of the case doctrine to the question of whether the opinions of non-examining physicians Drs. Renn and O'Neill constitute substantial evidence to support rebuttal under Section 727.203(b)(3) in this Fourth Circuit case. *See Williams v. Healy-Ball-Greenfield,* 22 BRBS 234 (1989)(2-1 opinion with Brown, J., dissenting).

In *Malcomb*, the Fourth Circuit court found that the administrative law judge erroneously relied upon the one non-examining physician's opinion of record, that of Dr. Zaldivar, who attributed the miner's disability to alcoholism, which the court held was insufficient as a matter of law to establish rebuttal pursuant to Section 727.203(b)(3) because none of the examining physicians had diagnosed alcoholism nor addressed whether such condition played a role in claimant's total disability.[6] *Malcomb*, 15 F.3d at

[6]Specifically, the court stated that:

> none of the physicians who examined Malcomb, on whose reports Zaldivar based his opinion, had even diagnosed Malcomb with alcoholism, much less suggested it as a possible cause of Malcomb's disability. In fact, the only mention of Malcomb's alcohol intake by a physician who had examined him was a statement in a medical report of Dr. Duffield, who indicated, after he had examined Malcomb, that Malcomb 'use [sic] to drink alot' before quitting drinking in 1979.

Malcomb, 15 F.3d at 366, 18 BLR at 2-115. The court additionally noted that:

> We are aware that the Board, when it first remanded Malcomb's case to the ALJ made a finding that conflicts with our analysis. The Board found that 'examining physicians . . . had addressed the issues addressed in Dr. Zaldivar's opinion.' This is not accurate. While the physicians who examined Malcomb did address some of the issues Zaldivar considered in his opinion, namely Malcomb's smoking and asthma, none addressed his supposed alcoholism.

Malcomb, 15 F.3d at 371 n. 7, 18 BLR at 2-122 n. 7.

370-371, 18 BLR at 2-121-122. In the instant case, as noted *supra,* the medical reports relevant to Section 727.203(b)(3) include that of Dr. Buddington, an examining physician, and those of Drs. Renn and O'Neill, non-examining physicians. Director's Exhibits 8, 12; Claimant's Exhibit 2; Employer's Exhibits 1, 2, 3. Dr. Buddington recorded a twenty pack-year smoking history, Director's Exhibit 8, and the non-examining physicians, Drs. Renn and O'Neill, reviewed this notation when arriving at their conclusions that claimant's respiratory impairment is due to his cigarette smoking, Employer's Exhibits 1, 2, 3, an issue which Dr. Buddington did not address.

In light of the analysis provided by the Fourth Circuit court in *Malcomb*, we now conclude that the opinions of non-examining physicians, Drs. Renn and O'Neill, that claimant's disability was due to cigarette smoking rather than coal mine employment, go beyond the "matters" sufficiently addressed by examining physician Dr. Buddington, whose report merely mentions a cigarette smoking history and does not discuss cigarette smoking as a cause of claimant's disability.[7] Consequently we hold that the opinions of Drs. Renn and O'Neill are inadequate, as a matter of law, to establish rebuttal pursuant to Section 727.203(b)(3) in this case arising within the Fourth Circuit. *See Malcomb, supra; Turner, supra; Massey, supra.* We therefore reverse our

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[7]At issue in this appeal are the opinions of these three physicians:

Dr. Buddington examined claimant on February 15, 1980 and opined that claimant has moderate chronic pulmonary disease ("not COPD," *see* Director's Exhibit 12; Claimant's Exhibit 2) and "possible" coal workers' pneumoconiosis based on "0/1 p" x-ray reading, and that he suffers from a moderate chronic respiratory impairment based on history, physical examination and abnormal blood gas studies. Director's Exhibit 8. Dr. Buddington stated further that "the patient may be able to perform some heavy
physical labor but for brief periods of time with long periods of rest in between." He recorded a "20-pack year" smoking history. Director's Exhibit 8; *see also* Director's Exhibit 12; Claimant's Exhibit 2.

On October 17, 1983, Dr. Renn reviewed the medical evidence and diagnosed "chronic bronchitis without physiologic impairment . . . secondary to his years of smoking cigarettes," but found no pneumoconiosis and no ventilatory impairment. Employer's Exhibit 3. Dr. Renn concluded that claimant is able to perform his usual coal mine work. *Id.*

In a report dated September 6, 1983, Dr. O'Neill opined that the "predominant evidence is that [claimant] does not have cwp and no evidence of significant respiratory impairment . . . he has the respiratory capacity to perform hard manual labor." Employer's Exhibit 1. In a supplemental report dated October 17, 1983, Dr. O'Neill reviewed additional x-ray interpretations and this report contains conclusions *verbatim* to those in his September 1983 report. Employer's Exhibit 2.

previous holding in this regard and reverse the administrative law judge's crediting of the opinions of Drs. Renn and O'Neill on the foregoing basis. Further, an award of benefits must be entered inasmuch as there is no medical opinion of record sufficient to establish rebuttal pursuant to Section 727.203(b)(3). *See Malcomb*, *supra*; *Turner*, *supra*; *Massey*, *supra*. Inasmuch as we hold that claimant is entitled to an award of benefits, we remand the case to the administrative law judge for him to determine the date of entitlement pursuant to 20 C.F.R. §725.503.

Accordingly, the [1993] Decision and Order on Remand of the administrative law judge denying benefits is reversed and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge