BRB No. 04-0242 BLA

EVELYN DUNCIL (Deceased) (Widow of CHARLES DUNCIL) Claimant-Respondent v. EASTERN ASSOCIATED COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/20/2004 DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (02-BLA-0346) and (02-BLA-0347) of Administrative Law Judge Daniel L. Leland awarding benefits on claims 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 miner initially filed a claim with the Social Security Administration (SSA) on May 24, 1973. Director's Exhibit 37. The SSA denied the claim on September 4, 1973. *Id.* The miner filed a second claim with the Department of Labor (DOL) on May 21, 1979. Director's Exhibit 1. The SSA again denied the miner's SSA claim on September 4, 1979.[2] Director's Exhibit 33. Although the DOL initially denied the miner's DOL claim on March 20, 1981, Director's Exhibit 22, it subsequently awarded benefits on July 13, 1982. Director's Exhibit 31. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 32, 38.

In a Decision and Order dated September 10, 1987, Administrative Law Judge John C. Bradley found that neither the miner's 1973 SSA claim nor his 1979 DOL claim was subject to transfer of liability to the Black Lung Disability Trust Fund (Trust Fund). Director's Exhibit 57. After crediting the miner with nineteen years and three and one-half months of coal mine employment, 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). *Id.* He also found that the evidence was insufficient to establish rebuttal of the presumption pursuant to 20 C.F.R. §727.203(b)(1)-(4). *Id.* Accordingly, Judge Bradley awarded benefits. *Id.*

By Decision and Order dated May 17, 1989, the Board affirmed Judge Bradley's transfer of liability and length of coal mine employment findings as unchallenged on appeal. *Duncil v. Eastern Associated Coal Co.*, BRB No. 87-2854 BLA (May 17, 1989) (unpublished). The Board also affirmed Judge Bradley's findings that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1)-(4). *Id.* The Board, however, vacated Judge Bradley's finding that the evidence was sufficient to establish invocation pursuant to 20 C.F.R. §727.203(a)(1) and remanded the case for further consideration. *Id.*

Due to Judge Bradley's unavailability, Administrative Law Judge Michael P.

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[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Although the miner received an election card on or about March 24, 1978, he did not elect Department of Labor (DOL) review of his Social Security Administration (SSA) claim until August 31, 1982. Director's Exhibit 33. Citing 20 C.F.R. §727.104(b) (2000), the DOL determined that the miner's election was "null and void because [it was] not filed within 6 months of notice and not submitted to/accepted by SSA." *Id.*

Lesniak considered the claim on remand. Judge Lesniak found that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2) and (a)(4). Director's Exhibit 75. Judge Lesniak, therefore, awarded benefits.[3] *Id.* By Decision and Order dated April 9, 1992, the Board affirmed, *inter alia*, Judge Lesniak's finding that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2).[4] *Duncil v. Eastern Associated Coal Co.*, BRB No. 90-1945 BLA (Apr. 9, 1992) (unpublished). The Board, therefore, affirmed Judge Lesniak's award of benefits. *Id.* Employer subsequently filed a motion for reconsideration with the Board.

While employer's motion for reconsideration was pending, the miner died on March 25, 1993. Director's Exhibit 3 (Survivor's Claim).[5] Claimant, the miner's surviving divorced spouse, filed a survivor's claim on April 30, 1993. Director's Exhibit 1 (Survivor's Claim). In a Decision and Order dated August 14, 1995, Judge Lesniak found that claimant was entitled to derivative survivor's benefits pursuant to 20 C.F.R. §725.212 (2000). Director's Exhibit 35 (Survivor's Claim). Although employer filed an appeal with the Board, employer subsequently filed a request for modification. Director's Exhibit 17 (Survivor's Claim). On October 11, 1995, employer requested that the Board consolidate its appeal of the award of benefits in the survivor's claim with its appeal of the award of benefits in the miner's claim (which was still pending before the Board on a motion for reconsideration). Director's Exhibit 16 (Survivor's Claim). Employer also requested that both cases be remanded to the district director for consideration of employer's motion for modification. *Id.* By Order dated October 27, 1995, the Board granted employer's motion to consolidate the two cases; dismissed

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[3] The Director, Office of Workers' Compensation Programs (the Director), subsequently filed a motion for reconsideration, requesting that Judge Lesniak specifically order employer to reimburse the Black Lung Disability Trust Fund (Trust Fund) for all interim benefits paid by the Trust Fund to the miner. By Order dated July 2, 1990, Judge Lesniak granted the Director's motion for reconsideration and amended his Decision and Order on Remand to order employer to reimburse the Trust Fund for all interim benefits paid to the miner. Director's Exhibit 72.

[4] In light of the its affirmance of Judge Lesniak's finding of invocation pursuant to 20 C.F.R. §727.203(a)(2), the Board held that Judge Lesniak's error, if any, in finding the evidence sufficient to establish invocation pursuant to 20 C.F.R. §727.203(a)(4) was harmless. *Duncil v. Eastern Associated Coal Co.*, BRB No. 90-1945 BLA (Apr. 9, 1992) (unpublished).

[5] The record contains separate exhibits filed in the miner's claim and the survivor's claim.

employer's appeal of the award of benefits in the survivor's claim; and remanded both cases to the Office of the District Director for modification proceedings. *Duncil v. Eastern Associated Coal Corp.*, BRB Nos. 90-1945 BLA and 95-2110 BLA (Oct. 27, 1995) (Order) (unpublished).

On May 13, 1998, the district director acknowledged employer's request for modification of both the miner's claim and the survivor's claim. Director's Exhibit 19 (Survivor's Claim). In a Proposed Decision and Order dated November 16, 1998, the district director found that claimant was entitled to survivor's benefits.[6] Director's Exhibit 22 (Survivor's Claim). On January 5, 1999, the cases were forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 39 (Survivor's Claim).

In a Decision and Order dated April 16, 2001, Administrative Law Judge Gerald M. Tierney noted that employer asserted that the award of benefits in the miner's claim was based upon a mistake in a determination of fact.[7] Director's Exhibit 58 (Survivor's Claim). Judge Tierney, however, found that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2) and (a)(4). *Id.* Judge Tierney also found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1)-(4). *Id.* Judge Tierney, therefore, found that there was not a mistake in a determination of fact that would warrant modification of the award of benefits in the miner's claim. Consequently, Judge Tierney denied employer's request for modification pursuant to 20 C.F.R. §725.310 (2000). *Id.* Based upon the award of benefits in the miner's claim, Judge Tierney found that claimant was entitled to derivative survivor's benefits. *Id.*

Employer filed an appeal with the Board. Director's Exhibit 59 (Survivor's Claim). However, on August 14, 2001, the Director, Office of Workers' Compensation Programs (the Director), filed a motion to dismiss employer's appeal without prejudice and remand the case for modification proceedings. Director's Exhibit 64 (Survivor's Claim). The Director advised the Board that employer had filed a request for modification with the Office of the District Director. *Id.* By Order dated December 18, 2001, the Board dismissed employer's appeal and remanded the case to the district

[6] It does not appear that the district director considered the merits of the miner's claim.

[7] Judge Tierney noted that claimant, the miner's surviving divorced spouse, died on May 1, 1999. Director's Exhibit 58 (Survivor's Claim).

director for modification proceedings.[8] *Duncil v. Eastern Associated Coal Corp.*, BRB No. 01-0678 BLA (Dec. 18, 2001) (Order) (unpublished).

In a Proposed Decision and Order dated March 28, 2002, the district director denied employer's request for modification. Director's Exhibit 67 (Survivor's Claim). At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 69 (Survivor's Claim).

In a Decision and Order dated October 27, 2003, Administrative Law Judge Daniel L. Leland (the administrative law judge) considered whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge found that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2) and (a)(4). He also found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1)-(4). The administrative law judge, therefore, found that employer had not demonstrated a mistake in a determination of fact that would warrant modification of the award of benefits in the miner's claim. He further found that claimant was entitled to derivative survivor's benefits pursuant to 20 C.F.R. §725.212 (2000). The administrative law judge, therefore, ordered employer to reimburse the Trust Fund for the interim benefit payments that had been paid to the miner and to claimant.[9] On appeal, employer contends that the case should be dismissed because there is not a proper party-in-interest. Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2) and (a)(4). Employer also argues that the administrative law judge erred in finding the evidence insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4). The Director has filed a limited response, contending that the deaths of the miner and his surviving divorced spouse have not rendered this case moot. No response on behalf of the miner or claimant has been filed.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable

[8] The Board informed employer that its case would be reinstated only if employer requested reinstatement. *Duncil v. Eastern Associated Coal Corp.*, BRB No. 01-0678 BLA (Dec. 18, 2001) (Order) (unpublished). The Board further informed employer that its request for reinstatement had to be filed with the Board within thirty days from the date the decision on modification was issued and had to be identified by the Board's docket number, BRB No. 01-0678 BLA. *Id.*

[9] The administrative law judge subsequently summarily denied employer's motion for reconsideration.

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).

Employer initially contends that the Board does not have jurisdiction of this appeal. Employer's contention is based on the premise that because the miner and claimant have died, there is no party-in-interest in this case. The pertinent regulation provides that "[e]xcept as provided in §725.361, no person other than the Secretary of Labor and authorized personnel of the Department of Labor shall participate at any stage in the adjudication of a claim for benefits under this part, unless such person is determined by the appropriate adjudication officer to qualify under the provisions of this section as a party to the claim." 20 C.F.R. §725.360(a). Employer accurately notes that no party has been formally substituted for the miner or his surviving divorced spouse.[10] The administrative law judge, however, has ordered employer to reimburse the Trust Fund for the payment of the interim benefits that have been paid to the miner and claimant. The Director has standing, as a party-in-interest, to ensure the proper enforcement and the lawful administration of the Black Lung program. *See Reed v. United Coal Co.*, 10 BLR 1-67 (1987). Thus, because the Director, as a party-in-interest, has the authority to defend claims on behalf of the Trust Fund, we reject employer's assertion that the Board does not have jurisdiction of this appeal.

Employer next argues that the administrative law judge erred in not permitting an extension of the discovery schedule to permit employer to take Dr. Branscomb's deposition. An administrative law judge is afforded broad discretion in dealing with procedural matters. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). In this case, the administrative law judge granted employer's request to hold the record open until September 9, 2003 for the submission of evidence. Although employer, under cover letter dated September 9, 2003, submitted evidence, employer did not request an extension of time in which to submit additional evidence. Employer waited until October 6, 2003, almost a month after the deadline for the submission of evidence had passed, to provide the court with notice of Dr. Branscomb's telephonic deposition. Under these circumstances, we hold that the administrative law judge acted within his discretion in not permitting employer to submit Dr. Branscomb's deposition testimony into the record.

We now turn our attention to the administrative law judge's consideration of employer's request for modification in the miner's claim. In reviewing the record as a

[10] 20 C.F.R. §725.360(b) provides that "[a] widow, child, parent, brother, or sister, or the representative of a decedent's estate, who makes a showing in writing that his or her rights with respect to benefits may be prejudiced by a decision of an adjudication officer, may be made a party."

whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see also Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Employer argues that the administrative law judge erred in finding the evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.202(a)(2). Employer specifically contends that the administrative law judge erred in relying upon Dr. Bellotte's qualifying July 4, 1987 pulmonary function study to support invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2). Employer contends that the administrative law judge provided no basis for crediting Dr. Bellotte's purported validation of the July 14, 1987 pulmonary function study over the invalidations of the study provided by Drs. Naeye and Branscomb.

Employer argues that the administrative law judge ignored Dr. Naeye's opinion that the miner's 1987 pulmonary function study was invalid. Contrary to employer's contention, Dr. Naeye did not invalidate the miner's July 14, 1987 pulmonary function study.[11] Although Dr. Naeye noted that "[o]ther pulmonary function studies did not produce valid results because of lack of patient cooperation," the doctor did not indicate that these "other" studies included Dr. Bellotte's 1987 pulmonary function study.[12] Consequently, we reject employer's contention that the administrative law judge erred in ignoring Dr. Naeye's opinion regarding the validity of the miner's July 14, 1987 pulmonary function study.

Employer next argues that neither Dr. Bellotte nor his technician validated the results of the July 14, 1987 pulmonary function study. Employer contends that although a statement of cooperation and understanding accompanies the miner's July 14, 1987 diffusion capacity test, no such statement accompanies the pulmonary function study itself. Employer also argues that there is no evidence that Dr. Bellotte administered

[11] In his 2001 Decision and Order, Judge Tierney stated that "Dr. Naeye noted Dr. Bellotte's 1987 pulmonary function study but did not dispute its reliability." Director's Exhibit 58 (Survivor's Claim).

[12] Dr. Naeye may have been referring to the results of claimant's pulmonary function studies conducted on August 5, 1980 and January 29, 1981. Dr. Gaziano invalidated these studied because he found that the miner provided less than optimal effort. *See* Director's Exhibits 11, 12. Dr. Lapp also noted that the miner did not "match quality control" during his August 6, 1982 pulmonary function study. *See* Director's Exhibit 34.

nebulized bronchodilators as required by the regulations. In its 1992 Decision and Order, the Board rejected these same contentions, stating that:

> We….reject employer's contention that Dr. Bellotte's pulmonary function study does not contain a statement of cooperation and effort and that the physician failed to administer nebulized bronchodilators as required in the presence of wheezing on physical examination, and that, therefore, [Judge Lesniak's] reliance on the study to find the interim presumption invoked under subsection (a)(2) constitutes error. *See* 20 C.F.R. §410.430; Employer's Exhibit 2. Contrary to employer's contention, the exhibit contains a statement of cooperation and effort. Specifically, the page of the exhibit entitled "Pulmonary Function Summary" states in the comments section the following: "Good effort and cooperation put forth." Employer's Exhibit 2. This statement is sufficient to satisfy the quality standards of 20 C.F.R. §410.430. *See generally Bowman v. Director, OWCP*, 7 BLR 1-718 (1985). Further, contrary to employer's contention, Dr. Bellotte noted on the test that bronchodilators were administered and employer has offered no expert opinion in support of his contention that Dr. Bellotte's test failed to conform to this technical requirement. *See Inman v. Peabody Coal Co.*, 6 BLR 1-1249 (1984).

Duncil v. Eastern Associated Coal Co., BRB No. 90-1945 BLA (Apr. 9, 1992) (unpublished), slip op. at 3.

Although employer accurately notes that the comment regarding claimant's "good effort and cooperation" appears on the page of the report listing the results of the miner's diffusion capacity study, the Board, in its 1992 Decision and Order, accurately noted that this page is entitled "Pulmonary Function Summary." Thus, we reaffirm our previous holding that the July 14, 1987 pulmonary function study contains a statement of cooperation and comprehension. We also reaffirm our previous holding that the record does not support employer's contention that Dr. Bellotte did not properly administer bronchodilators.

Employer also contends that the miner's 1987 pulmonary function study does not reflect the miner's actual pulmonary function. Employer notes that 20 C.F.R. §410.430 provides that testing should not be performed during or soon after an acute respiratory illness. Employer's Brief at 16. Employer argues that Dr. Bellotte indicated that the 1987 pulmonary function study was conducted on one of the miner's bad days. The administrative law judge noted that Judge Tierney, in his 2001 Decision and Order, rejected employer's contention that the pulmonary function studies were invalid because they were performed on a "bad" day. Decision and Order at 4. In his 2001 Decision and Order, Judge Tierney stated that:

> Employer argued that the 1987 pulmonary function study was invalid because the test was conducted on a "bad" day. Employer asserted that because the miner was wheezing and having an acute bronchospastic attack on the day of testing, the test did not meet the technical requirements of §410.430. I am not persuaded.
>
> Dr. Bellotte is a board-certified pulmonary specialist. He acknowledged that he was conducting a coal workers' pneumoconiosis evaluation. He described the pulmonary function study he performed as valid and relied on its results in his conclusion. Section 410.430 provides that pulmonary function studies should not be performed during or soon after an acute respiratory illness. There is no indication that the miner was suffering or recovering from an acute respiratory illness at the time of Dr. Bellotte's exam. Dr. Bellotte testified that the results of the miner's pulmonary function study were compatible with a diagnosis of asthma and bronchospasm but did not state that the miner suffered a bronchospastic attack during testing. Nor did Dr. Bellotte report that he saw the miner on a "bad" day. In discussing variability as a characteristic of asthma, Dr. Bellotte stated that he "may" have seen the miner on a bad day. Dr. Bellotte reported that the miner was wheezing. However, §410.430 does not preclude pulmonary function testing because of wheezing. Section 410.430 provides that if wheezing is present, studies must be performed following the administration of a bronchodilator. Dr. Bellotte performed testing after the administration of a bronchodilator. I find the fact that Dr. Bellotte, who is a board-certified pulmonary specialist specifically performing a coal workers' pneumoconiosis evaluation, considered the pulmonary function study results valid sufficient to conclude that those results were reliable.

Director's Exhibit 58 (Survivor's Claim).

The administrative law judge agreed with Judge Tierney's conclusion that the miner's 1987 pulmonary function study was not performed during or soon after an acute respiratory illness. Because it is supported by the record, we affirm the administrative law judge's determination.

Employer also argues that the administrative law judge failed to provide a basis for crediting Dr. Bellotte's validation of the July 14, 1987 pulmonary function study over Dr. Branscomb's invalidation. In his June 5, 2003 report, Dr. Branscomb opined that the miner's July 14, 1987 pulmonary function study was invalid "because of the absence of plateaus and the fact that the initial effort has been cut off." Employer's Exhibit 2 (Survivor's Claim). The Board has held that an administrative law judge must provide a

rationale for preferring the opinion of a consulting physician over that of the administering doctor. *See Siegel v. Director, OWCP*¸8 BLR 1-156 (1985). In his consideration of whether the miner's 1987 pulmonary function study was valid, the administrative law judge stated:

> Although Dr. Branscomb opined that the studies were invalid, he is the only physician to question their validity and I accord his opinion on the validity of the studies less weight than the opinion of Dr. Bellotte who conducted the studies. The studies were the most recent by five years and therefore are more probative than the earlier studies regarding the miner's pulmonary condition.

Decision and Order at 4.

The administrative law judge acted within his discretion in finding that there was no basis to credit the opinion of Dr. Branscomb, a consulting physician, that the miner's 1987 pulmonary function study was invalid, over the contrary opinion of Dr. Bellotte, the administering physician. Moreover, Dr. Fino also reviewed the results of the miner's July 14, 1987 pulmonary function study. While not explicitly validating the study, Dr. Fino relied upon the results of the miner's 1987 pulmonary function study to support his finding of a totally disabling respiratory impairment. *See* Employer's Exhibit 1 (Survivor's Claim). Thus, Dr. Fino did not question the validity of the July 14, 1987 pulmonary function study.

Finally, employer argues that the administrative law judge erred in not addressing the other pulmonary function study evidence of record. The administrative law judge found that the miner's 1987 pulmonary function studies "were the most recent by five years and therefore [were] more probative than earlier studies regarding the miner's pulmonary condition." Decision and Order at 4. He permissibly determined that the miner's most recent July 14, 1987 pulmonary function study was more probative of the miner's pulmonary condition than the older studies. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish invocation pursuant to 20 C.F.R. §727.203(a)(2). In light of our affirmance of this finding, we need not address employer's contentions of error regarding the administrative law judge's finding that the evidence is sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(4). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1982).

Employer next argues that the administrative law judge erred in finding the evidence insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3). Section 727.203(b)(3) provides that the presumption "shall be rebutted 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." 20 C.F.R. §727.203(b)(3). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in order to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3):

> [A]n employer must "rule out the causal relationship between the miner's total disability and his coal mine employment." *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123 (4th Cir. 1984). An employer can accomplish this task with evidence that establishes either that the miner has no respiratory or pulmonary impairment of any kind, *see Grigg*, 28 F.3d at 419, or that such impairment was not caused in whole or in part by his coal mine employment, *see Lane Hollow*, 137 F.3d at 804.

Consolidation Coal Co. v. Borda, 171 F.3d 175, 184-185, 21 BLR 2-545, 2-562 (4th Cir. 1999).

The administrative law judge found that the opinions of Drs. Fino, Branscomb, Naeye and Bellotte were insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Decision and Order at 4-5. Employer argues that the administrative law judge erred in finding the opinions of these physicians insufficient to establish subsection (b)(3) rebuttal.

The administrative law judge found that Dr. Fino's opinion was speculative as to the cause of the miner's pulmonary disability and did not convincingly rule out any contribution from the miner's coal mine employment.[13] Decision and Order at 5; Employer's Exhibit 1. He acted within his discretion in according less weight to Dr. Fino's opinion because the doctor failed to explain the basis for his conclusion that the miner's lung impairment was not caused by coal dust exposure. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

[13] Dr. Fino noted that the medical evidence revealed that the miner had a significant decrease in his lung function between 1982 and 1987. Employer's Exhibit 1. Dr. Fino opined that such a reduction over the course of five years was inconsistent with a coal mine dust related abnormality, but was "quite consistent with someone who [had] a smoking related obstructive disease." *Id.* Dr. Fino, therefore, concluded that the miner's disabling respiratory impairment was attributable to his smoking. *Id.*

The administrative law judge found that although Dr. Branscomb asserted that the miner's asthma was the cause of his pulmonary problems, the doctor failed to justify his conclusion that the miner's coal dust exposure played no part in causing his pulmonary disability. Decision and Order at 5; Employer's Exhibit 2. The administrative law judge, therefore, properly found that Dr. Branscomb's opinion was not sufficiently explained. *Clark, supra*; *Lucostic, supra*. Dr. Branscomb also opined that the miner did not suffer from a totally disabling pulmonary impairment. The administrative law judge properly discredited Dr. Branscomb's opinion that the miner did not suffer from a totally disabling pulmonary impairment because it was not sufficiently explained and because it was not supported by the weight of the evidence. *Id.*; Decision and Order at 4. The remainder of Dr. Branscomb's opinion focuses upon whether the miner's death was due to pneumoconiosis. In this miner's claim, the issue is whether the miner's total disability was due to pneumoconiosis; not whether the miner's death was due to the disease.

The administrative law judge agreed with Judge Tierney's finding that Dr. Bellotte, as a Board-certified pulmonary specialist, was better qualified to address the cause of the miner's pulmonary impairment than was Dr. Naeye, a pathologist. Decision and Order at 5. The administrative law judge permissibly credited Dr. Bellotte's opinion over that of Dr. Naeye based upon Dr. Bellotte's superior qualifications.[14] *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Moreover, Dr. Naeye failed to explain the basis for his conclusion that the miner's mild coal workers' pneumoconiosis, if present, did not cause any impairments in the his ability to work. *See* Director's Exhibit 43 (Survivor).

Employer finally contends that the administrative law judge erred in finding that Dr. Bellotte's opinion was insufficient to support a finding of subsection (b)(3) rebuttal. In a report dated August 6, 1987, Dr. Bellotte opined that:

> It is my impression that the vast majority of [the miner's] pulmonary impairment [was] not related to his coal dust exposure in his coal mine employment history.

Director's Exhibit 46.

During an August 18, 1987 deposition, Dr. Bellotte explained that it was far more likely that the miner's cough and sputum production were related to his tobacco abuse than to any diagnosis of industrial bronchitis. Director's Exhibit 48 at 14. Dr. Bellotte also opined that the miner's cough and sputum production could also be attributable to

[14]Dr. Bellotte is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 46. Dr. Naeye is Board-certified in Anatomic and Clinical Pathology. Director's Exhibit 43 (Survivor).

his asthma. *Id.* Thus, although Dr. Bellotte could not completely exclude a diagnosis of industrial bronchitis, he noted that there were other reasons to account for the miner's symptoms of cough and sputum production. *Id.* at 14-15. Dr. Bellotte further stated that:

> My feeling was that this is a case of a man who unfortunately has asthma, and who smoked on top of it, and ended up with chronic bronchitis and emphysema on top of that. He also worked in a dusty occupation and it didn't help anything, but I think that if this man never worked in a coal mine at all, he would still be in the predicament he is in.

Director's Exhibit 48 at 25-26.

Citing *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992), employer contends that Dr. Bellotte's testimony is sufficient to support a finding of subsection (b)(3) rebuttal because the doctor opined that the miner would be in the same predicament even if he had never worked in the mines. In *Beasley*, the Seventh Circuit held that:

> Once a black lung claimant establishes a presumption of total disability and entitlement to benefits an employer may rebut the presumption by, among other things, showing that CWP was not a "contributing cause" of the claimant's disability. A "contributing cause" is a necessary, though not necessarily sufficient, cause of the miner's disability. Thus, an employer can rebut the presumption of total disability due to CWP by showing, for example, that a claimant's smoking would have disabled him by itself, even if he had spent his life as an accountant rather than a miner. Though we have said in the past that rebuttal is achieved only by showing that CWP "was in no way a factor" in the miner's disability, this does not mean that the employer must prove its rebuttal case beyond a reasonable doubt. Rather, the employer need only rule out CWP as a contributing cause by a preponderance of the evidence.

Beasley, 957 F.2d at 327, 16 BLR at 2-48 (citations omitted).

The United States Court of Appeal for the Fourth Circuit, within whose jurisdiction this case arises, has similarly recognized that if a claimant would have been disabled to the same degree and by the same time in his life if he had never been a miner, benefits should not be awarded. *See Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304, (4th Cir. 1995). However, subsequent to indicating that the miner would be in the "predicament he is in" had he never been a miner, Dr. Bellotte opined that, while the miner's smoking was the "greater contributor" to his pulmonary impairment, his

occupational history also could not be ruled out as a factor. Director's Exhibit 48 at 26. We, therefore, affirm the administrative law judge's finding that Dr. Bellotte's opinion is insufficient to support a finding of subsection (b)(3) rebuttal. Consequently, the administrative law judge's finding that the evidence is insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3) is affirmed.

Employer also argues that the administrative law judge erred in finding the evidence insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(4). To establish subsection (b)(4) rebuttal, the party opposing entitlement must demonstrate that the miner has neither coal workers' pneumoconiosis, as that term is used in the medical profession, nor any other chronic dust disease of the lung arising out of coal mine employment. *See Barber v. U.S. Steel Mining Co.*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); *Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985).

Employer contends that the administrative law judge, in finding the evidence insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(4), erred in crediting Dr. Bellotte's opinion over those of Drs. Fino, Naeye and Branscomb. Dr. Bellotte opined that he could not exclude a diagnosis of industrial bronchitis. Director's Exhibit 48 at 13-14. The administrative law judge credited Dr. Bellotte's opinion that a finding of legal pneumoconiosis (industrial bronchitis) could not be excluded over the contrary opinions of Drs. Fino, Naeye and Branscomb. He credited Dr. Bellotte's opinion over the opinions of Drs. Fino, Naeye and Branscomb for the same reasons that he did so in his consideration of the evidence at 20 C.F.R. §727.203(b)(3). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(4). Consequently, we affirm his finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).

Accordingly, the administrative law judge's Decision and Order awarding benefits in the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge