BRB Nos. 02-0236 BLA
and 02-236 BLA-A

ODIE L. RIDINGS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
C & C COAL COMPANY;	)	
L & M COAL CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
Cross-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Lenore Ostrowsky (Greenberg Traurig LLP), Washington, D.C., for employer and carrier.

Jennifer U. Toth (Howard Radzely, Acting 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 L & M Coal Corporation (L&M or employer) appeals the Decision and Order (1997-BLA-1804) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) 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).[1] The lengthy procedural history of this case is set forth in the Board's Decision and Order issued in employer's last appeal, *see Ridings v. C & C Coal Co., et al.*, BRB Nos. 98-1548 BLA, 98-1548 BLA-A, 93-0911 BLA and 93-0911 BLA-A (Oct. 20, 1999)(unpub.). In that appeal, the Board rejected employer's argument that the administrative law judge lacked jurisdiction to consider claimant's fourth request for modification pursuant to 20 C.F.R. §725.310 (2000).[2] The Board vacated Administrative Law Judge Arthur C. White's 1980 designation of C & C Coal Company (C&C) as the responsible operator herein, and remanded this case for the administrative law judge to readjudicate the responsible operator issue in light of the decision of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995). The Board also vacated the administrative law judge's finding that invocation of the interim presumption was established pursuant to 20 C.F.R. §727.203(a)(1), instructing the administrative law judge to reevaluate the x-ray evidence of record in accordance with *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), and, if he found invocation established at Section 727.203(a)(1), to determine whether the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(4). The Board further instructed the administrative law judge to determine whether the evidence established invocation at Section 727.203(a)(2)-(4) if, on remand, he found that invocation was not established at Section 727.203(a)(1). The Board affirmed the administrative law judge's finding that the evidence was insufficient to establish rebuttal pursuant to Section

[1]The Department of Labor (DOL) 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 except for citations to the regulations at 20 C.F.R. Part 727. DOL has discontinued publication of the regulations at 20 C.F.R. Part 727, and the Part 727 criteria may be found at 43 Fed. Reg. 36818 (1978), or at 20 C.F.R., parts 500 to end, edition revised as of April 1, 1999. *See* 20 C.F.R. §725.4.

[2]The amendments to the regulation at 20 C.F.R. §725.310 do not apply to claims, such as this, which were pending on January 19, 2001. 20 C.F.R. §725.2.

727.203(b)(1), (2), but directed the administrative law judge to reassess the evidence relevant to rebuttal at Section 727.203(b)(3), and to consider claimant's entitlement under 20 C.F.R. Part 410, Subpart D, if entitlement was not established under 20 C.F.R. Part 727. Lastly, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §725.503(b) for him to consider all relevant evidence, consistent with *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989), in determining the appropriate date from which benefits, if awarded, were payable herein.

On remand, the administrative law judge dismissed C&C as a putative responsible operator, designated L&M as the proper responsible operator in this case, and found that the evidence of record was insufficient to establish invocation pursuant to Section 727.203(a)(1)-(3), but sufficient to establish invocation pursuant to Section 727.203(a)(4), with no rebuttal. Accordingly, benefits were awarded.

In the present appeal, employer again challenges the administrative law judge's jurisdiction to consider claimant's fourth request for modification pursuant to Section 725.310 (2000), and maintains that due process requires that liability for any payment of benefits be transferred to the Black Lung Disability Trust Fund (Trust Fund). Employer additionally challenges the administrative law judge's findings of no rebuttal at Section 727.203(b)(3), (4), and his onset findings pursuant to Section 725.503(b). Claimant has not participated in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, declining to address the administrative law judge's findings on the merits, but urging affirmance of the administrative law judge's jurisdiction to consider a fourth modification request, his determination of the onset date of claimant's total disability due to pneumoconiosis, and his designation of employer as the responsible operator herein. The Director has also filed a cross-appeal, challenging the administrative law judge's order directing a refund to C&C of the amount the company previously paid to the Department of Labor (DOL) as reimbursement for the Trust Fund's payment of interim benefits to claimant. In a combined brief and a citation of supplemental authority, employer replies in support of the arguments raised in its brief on appeal, and responds to the Director's cross-appeal, urging affirmance of the administrative law judge's refund order.[3]

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,

[3]We affirm, as unchallenged on appeal, the administrative law judge's finding that the weight of the evidence was insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1)-(3), but sufficient to establish invocation at Section 727.203(a)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Employer initially maintains that, under its regulations, DOL had the duty to name L&M a potential operator in 1978, the year in which this claim was filed.[4] Employer notes that the necessary information was in the record at that time, as the Social Security Administration earnings record showed that claimant's last employment with C&C was brief, and that he worked for L&M immediately before his employment with C&C, yet only C&C was notified of its potential liability, on September 21, 1979. Employer thus argues that, in accordance with Fourth Circuit case law, DOL's failure to notify L&M of its potential liability until 1990 constitutes a violation of employer's rights to procedural due process such that liability must transfer to the Trust Fund. We disagree.

Due process requires not merely that a party receive notice of a pending action; rather, the notice must afford a reasonable time for those interested to make their appearance. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). A "reasonable time" is "a time when the deprivation can still be prevented." *Fuentes v. Shevin*, 407 U.S. 67, 81 (19872). Drawing upon core elements of procedural due process, the Fourth Circuit has established a test for determining whether an employer is denied due process by the government's delay in notification of potential liability, *i.e.*, did the government deprive the employer of a fair opportunity to mount a meaningful defense to the proposed deprivation of its property. *See Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Consolidation Coal Co. v. Borda,* 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999).

In this case, the administrative law judge determined that DOL's twelve-year delay in

[4]Employer asserts that DOL's failure to discharge its duty to name L&M as a potential operator in 1978 was arbitrary and in disregard of its own regulation at 20 C.F.R. §725.407(b), (d). The Director correctly notes, however, that the provisions at Section 725.407 are not applicable to claims, such as this, which were pending on January 19, 2001. 20 C.F.R. §725.2. Instead, the regulation at 20 C.F.R. §725.412 (2000) sets forth the provisions for identification and notification of responsible operators.

notifying L&M of its potential liability did not delay the proceedings or prejudice either claimant or employer, as claimant had not prevailed in a final adjudication of the claim prior to the date of employer's notification on September 20, 1990. Rather, this case was before the district director on claimant's request for modification of the denial of benefits. Decision and Order at 12. The administrative law judge further found that employer had sufficient time to develop its case prior to the formal hearing in July 1991, and that both C&C and L&M developed substantial evidence in defense of the claim. The administrative law judge thus reasonably concluded that employer suffered no harm from the delay. Decision and Order at 12-13. The administrative law judge's finding that employer's due process rights were not violated is supported by substantial evidence and is affirmed. *Lockhart, supra; Borda, supra*. As employer has not challenged its designation as responsible operator on substantive grounds, we affirm the administrative law judge's finding that L&M is the proper responsible operator in this case.

Employer next repeats its contention that the administrative law judge lacked jurisdiction to consider claimant's fourth request for modification under Section 725.310 (2000), arguing that the prolonged proceedings in this case have denied employer the right to finality and that claimant's multiple requests for modification represent an abuse of process which distinguish this case from the modest, informal attempts by a miner to modify the claims examiner's denial of benefits in *Betty B. Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999), where the Fourth Circuit deferred to the Director's interpretation of the statute and regulations and found no bar to the filing of a new modification petition within one year of the denial of a prior one. Employer's Brief at 32-35. Employer's arguments are without merit. The Board addressed this issue in its Decision and Order in employer's previous appeal and held that because Fourth Circuit and Board case law recognize that multiple filings for modification are permissible, *see Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Garcia v. Director, OWCP*, 12 BLR 1-24 (1988), the administrative law judge properly adjudicated claimant's fourth request for modification. *Ridings, supra*, slip op. at 6. As we can discern no abuse of process by claimant, and because employer has not set forth any valid exception to the law of the case doctrine, we adhere to our previous holding regarding this issue. *Id.*; *see U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *see also Williams v. Healty-Ball-Greenfield*, 22 BRBS 234 (1989)(2-1 opinion with Brown, J., dissenting).

Turning to the merits, employer contends that the administrative law judge provided invalid reasons for his credibility determinations and thus erred in finding the evidence

insufficient to establish rebuttal at Section 727.203(b)(3), (4).[5] We disagree. After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge accurately reviewed the conflicting medical opinions, the respective qualifications of the physicians and the bases for their conclusions, and reasonably determined that the opinions of Drs. Fino, Castle, Dahhan, Fleenor, Robinette and Molony were well documented and had greater probative value concerning claimant's current condition than the significantly earlier medical opinions of record.[6] Decision and Order at 28. After considering the reasoning underlying the expert opinions of Drs. Fino, Castle and Dahhan, that claimant did not have pneumoconiosis or any impairment related to dust exposure in coal mine employment but was disabled by the effects of smoking, the administrative law judge accorded full weight to the opinion of Dr. Dahhan, but determined that Dr. Fino was unduly focused on clinical rather than legal pneumoconiosis, and that Drs. Fino and Castle ruled out coal mine employment as a cause of claimant's impairment in large part because they found no evidence of pneumoconiosis or disability at the time claimant left mining, with both emphasizing that in order for simple pneumoconiosis to progress after exposure to coal dust ceases, a miner must have x-ray abnormalities of pneumoconiosis and physiologic testing

[5]Employer also maintains that because claimant's fourth request for modification sought relief from a denial of benefits based on a finding of rebuttal, the administrative law judge improperly placed the burden of proving rebuttal on employer rather than claimant. Employer's Brief at 35. Employer's argument is without merit. While claimant has the burden of proving a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), the applicable burdens of proof regarding invocation and rebuttal under 20 C.F.R. Part 727 do not shift in modification proceedings. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

[6]We reject employer's argument that the 1974 opinion of Dr. Schmidt, that claimant had pneumoconiosis but suffered only a mild restrictive pulmonary impairment, Director's Exhibits 12, 27, 202, and the 1980 opinion of Dr. Abernathy, that claimant did not have pneumoconiosis but had chronic bronchitis and a mild obstructive breathing problem in the form of emphysema, Director's Exhibit 32, were relevant to the issue of disability causation at Section 727.203(b)(3) because they show that claimant continued to smoke but had no impairment related to his coal mine employment at the time he quit mining. Employer's Brief at 37. Neither opinion is sufficient to establish rebuttal at Section 727.203(b)(3), *see Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), and the administrative law judge reasonably found that because claimant established invocation at Section 727.203(a)(4), the early opinions of Drs. Schmidt and Abernathy finding minimal pulmonary impairment had little, if any, probative value concerning the cause of claimant's total respiratory impairment. Decision and Order at 28.

demonstrating impairment related to that process at the time he leaves mining. Decision and Order at 25-26, 29-31. As pneumoconiosis is recognized as a latent and progressive disease and there is no requirement that a miner demonstrate the presence of pneumoconiosis at the time he ceases mining in order to prevail on a claim for benefits, the administrative law judge acted within his discretion in finding that the opinions of Drs. Fino and Castle were inconsistent with the spirit and intent of the Act and regulations, and consequently were entitled to diminished weight. Decision and Order at 29-31; 20 C.F.R. §718.201(c); *see generally Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lockhart, supra; Adkins, supra*. The administrative law judge determined that the remaining opinions of Dr. Molony, claimant's treating physician, and Drs. Fleenor and Robinette, that claimant's disability was due at least in part to pneumoconiosis, were all well reasoned, and that the expert opinion of Dr. Robinette was particularly probative because the physician considered the miner's lengthy smoking and coal mine employment histories along with physical examination reports and respiratory test results, and fully explained his basis for concluding that claimant had legal pneumoconiosis and disability was due to both smoking and occupational disease. Decision and Order at 31; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge then acted within his discretion in finding that the opinions of Drs. Robinette, Molony and Fleenor were most consistent with all the information contained in the record, and outweighed the contrary opinion of Dr. Dahhan.[7] Decision and Order at 32; *see generally Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). As he had previously determined that the x-ray and CT scan evidence was in equipoise, Decision and Order at 15, 16, 22, 32, 33, the administrative law judge concluded that employer failed to establish rebuttal pursuant to Section 727.203(b)(3), (4) by a preponderance of the evidence. Decision and Order at 32, 33. The administrative law judge's findings pursuant to Section 727.203(b)(3), (4) are supported by substantial evidence and are affirmed. Consequently, we affirm the administrative law judge's award of benefits.

Employer next challenges the administrative law judge's findings pursuant to Section 725.503(b) regarding the date of onset of total disability due to pneumoconiosis. Specifically, employer argues that there is no support in the record for the administrative law judge's assignation of January 1, 1990 as the onset date; that an administrative law judge issued a Decision and Order finding that claimant did not have pneumoconiosis as of 1992;

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[7]We reject employer's argument that claimant is precluded from entitlement to benefits under the Act because he was disabled from working by a back injury. Employer's Brief at 36. While a miner is not entitled to benefits if he suffers a disabling condition which predates his respiratory disability such that he would have been totally disabled to the same degree and by the same time in his life had he never been a miner, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), the record contains no medical documentation of such a disabling back condition.

and that the first reliable evidence of total disability appears in Dr. Castle's 1997 report. Employer's Brief at 44-45. Employer's arguments are without merit. The administrative law judge properly found that he was not precluded from finding a date of entitlement earlier than 1993, as the Board's 1994 remand of this case, directing that a *de novo* review of the record be conducted, effectively set aside the Decision and Order denying benefits issued on January 8, 1993. The administrative law judge permissibly found that Dr. Robinette's opinion, supported by Dr. Molony's assessment, showed that pneumoconiosis prevented claimant from working since 1990, and that the weight of the evidence was insufficient to establish an onset date prior to that time. Decision and Order at 34. In view of the administrative law judge's prior credibility determinations, and the fact that Drs. Castle, Fino and Dahhan did not diagnose pneumoconiosis, we affirm the administrative law judge's findings pursuant to Section 725.503(b), as supported by substantial evidence and within his discretion. *Krecota, supra; Lykins, supra*.

Lastly, the Director contends that the administrative law judge's order directing DOL to refund to C&C the amount the company previously paid to the Trust Fund as reimbursement for the payment of interim benefits to claimant is invalid. We agree. The administrative law judge found that, due to his responsible operator adjudication and date of entitlement determination, both a refund and an offset were necessary in this case. Decision and Order at 35, 37. The Director correctly maintains, however, that under the facts of this case, the Trust Fund is not authorized by statute to refund any sums which C&C paid in reimbursement to the Trust Fund, *see* 26 U.S.C. §9501(d); rather, the overpayment must be pursued in a separate proceeding against the benefits recipient.[8] Consequently, we reverse the administrative law judge's refund order.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed, and his Order directing DOL to refund to C&C the amount the company previously paid to the Trust Fund as reimbursement for the payment of interim benefits to claimant is reversed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

[8]Moreover, the administrative law judge lacked jurisdiction to decide the matter, as it was not a contested issue before the administrative law judge for adjudication.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge