BRB Nos. 88-4027 BLA
and 88-4027 BLA-A

JOHN R. FRISCO	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Second Supplemental Decision and Order on Remand of Arthur C. White, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen), Fairmont, West Virginia, for claimant.

Douglas A. Smoot and Ilene S. Schnall (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Second Supplemental Decision and Order on Remand (80-BLA-9829) of Administrative Law Judge Arthur

C. White 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). This case is on appeal before the Board for the third time. In his original Decision and Order, the administrative law judge credited claimant with approximately twenty-five years of qualifying coal mine employment, and found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(1), with no rebuttal of that presumption. Accordingly, benefits were awarded. On appeal, the Board affirmed the administrative law judge's findings pursuant to Section 727.203(a)(1), but remanded this case for further findings and reconsideration of the evidence relevant to rebuttal at 20 C.F.R. §727.203(b)(2)-(4) and the onset date of disability.

On remand, the administrative law judge again found the evidence insufficient to establish rebuttal pursuant to Section 727.203(b)(2)-(4), and consequently awarded benefits commencing July 1, 1981. In the second appeal, the Board affirmed the administrative law judge's findings pursuant to Section 727.203(b)(2) and (4), and his findings regarding the onset date of disability, but vacated his findings pursuant to Section 727.203(b)(3), as the administrative law judge did not provide a valid reason for discrediting the opinions of Drs. Rhudy, Piccirillo and Kress, and did not address the opinion of Dr. Morgan thereunder. Consequently, the Board remanded this case for reconsideration of the evidence relevant to rebuttal at Section 727.203(b)(3) pursuant to the standard enunciated in *Bethlehem Mines*

Corp. v. Massey, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). *See Frisco v. Consolidation Coal Co.*, BRB Nos. 85-2197 BLA and 85-2197 BLA-A (July 27, 1988)(unpublished).

On the second remand, the administrative law judge found the evidence sufficient to establish rebuttal pursuant to Section 727.203(b)(3), but further found entitlement established pursuant to 20 C.F.R. §410.490. Accordingly, the administrative law judge awarded benefits. In the instant appeal, employer contends that the provisions at Section 410.490 are not applicable. Claimant has filed a cross-appeal, challenging the administrative law judge's finding that the evidence is sufficient to establish rebuttal pursuant to Section 727.203(b)(3). The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

Initially we note that, subsequent to the issuance of the administrative law judge's Second Supplemental Decision and Order on Remand, the United States Supreme Court issued *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 15 BLR 2-155 (1991). In light of said decision, the Board has held that a claim such as this which was properly adjudicated pursuant to 20 C.F.R. Part 727 is not subject to

further adjudication under Section 410.490. *Whiteman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991)(*en banc*). We, therefore, vacate the administrative law judge's finding of entitlement pursuant to Section 410.490.

Turning to the merits, claimant contends that the factual findings of the administrative law judge, contained in the Decision and Order, Supplemental Decision and Order on Remand, and Second Supplemental Decision and Order on Remand, do not support a finding of rebuttal pursuant to Section 727.203(b)(3). We agree. The administrative law judge determined that the medical opinions of record were based on examinations and/or testing of claimant in or before January of 1980; that the opinion of Dr. Rhudy, who diagnosed pneumoconiosis and concluded that claimant had a mild to moderate respiratory impairment, was insufficient to meet the *Massey* standard of rebuttal; and that the opinions of Drs. Kress, Morgan and Piccirillo found little or no respiratory impairment and ruled out any relationship between claimant's disability and his coal mine employment exposure, thereby satisfying the *Massey* standard. *See* Director's Exhibits 16, 34; Employer's Exhibits 1, 5, 7. The administrative law judge then found that despite the fact that a subsequent validated pulmonary function study, obtained on September 28, 1981, demonstrated that claimant's pulmonary condition had deteriorated to the point of total respiratory disability under the pertinent regulations, the Board's previous

instructions mandated that the administrative law judge credit the medical opinions of record and find rebuttal established pursuant to Section 727.203(b)(3). *See* Second Supplemental Decision and Order on Remand at 3, 4; Claimant's Exhibit 1; Employer's Exhibit 4. Said finding, however, appears to be based on a semantic misunderstanding; while the Board held that it was error for the administrative law judge to discredit the medical opinions of record as undocumented and unreasoned[1] solely because the record contained later qualifying clinical studies, the administrative law judge was not required to accept the physicians' conclusions. The proper inquiry for the administrative law judge is whether claimant is totally disabled due to pneumoconiosis at the time of the hearing. *See Coffey v. Director, OWCP*, 5 BLR 1-404 (1982). Since pneumoconiosis is a progressive disease, when more recent evidence demonstrates that claimant's condition has worsened, the administrative law judge need not credit earlier documented and reasoned medical opinions which are not relevant to claimant's respiratory condition at the time of the hearing. *See generally Bates v. Director, OWCP*, 7 BLR 1-113 (1984). In the instant case, inasmuch as the administrative law judge reasonably found that the qualifying pulmonary function study of September 28, 1981, constituted the most probative

[1] A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based his diagnosis; a "reasoned" opinion is one in which the
administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibralter Coal Corp.*, 6 BLR 1-1291 (1984).

evidence of claimant's respiratory condition, and as he further found that the physicians who rendered opinions regarding the cause and extent of claimant's respiratory impairment did not have the benefit of reviewing said objective evidence, rebuttal pursuant to Section 727.203(b)(3) is precluded. *See* Decision and Order at 9; Supplemental Decision and Order on Remand at 4-7; Second Supplemental Decision and Order on Remand at 3; *see generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Beavan v. Bethlehem Mines Corp.*, 741 F.2d 689, 6 BLR 2-101 (4th Cir. 1984). We, therefore, affirm the administrative law judge's factual findings as supported by substantial evidence, but reverse the administrative law judge's finding that rebuttal was established pursuant to Section 727.203(b)(3).

Accordingly, the Second Supplemental Decision and Order on Remand of the administrative law judge is affirmed in part, vacated in part and reversed in part, and the award of benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge