

BRB No. 92-0216 BLA

CHARLES L. CROESSMANN     )  
                                  )  
                  Claimant-Petitioner     )  
                                  )  
                  v.                             )  
                                  )  
INLAND STEEL 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 Decision and Order on Remand of Daniel L. Stewart,  
Administrative Law Judge, United States Department of Labor.

Jeff Troutt (Troutt, Alexander, Popit & Warner), Benton, Illinois, for claimant.

Brian M. Shifrin (Gould & Ratner), Chicago, Illinois, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (85-BLA-4465) of Administrative Law Judge Daniel L. Stewart denying 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 to the Board for the second time. Claimant filed a claim for benefits on November 2, 1979. After crediting claimant with thirty-two years of coal mine employment, the administrative law judge found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(3) and that employer established rebuttal

pursuant to 20 C.F.R. §§727.203(b)(2), (3), and (4). The administrative law judge then found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204. Accordingly, benefits were denied. On appeal, the Board vacated the administrative law judge's findings at 20 C.F.R.

§§727.203(b)(3) and (4) as they were invalid pursuant to *Taylor v. Peabody Coal Co.*, 892 F.2d 503, 11 BLR 2-43 (7th Cir. 1989), *reh'g denied*, 14 BLR 2-79 (1990). The Board also vacated the administrative law judge's findings pursuant to 20 C.F.R. §727.203(b)(2), remanded the case for reconsideration of Section 727.203(b)(2) pursuant to *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987), and if rebuttal is established, then consideration pursuant to 20 C.F.R. §410.490. The Board further affirmed the administrative law judge's findings at 20 C.F.R. Part 718 as unchallenged on appeal. *Croessmann v. Inland Steel Coal Co.*, BRB No. 88-4305 BLA (Oct. 31, 1990)(unpub.). On remand, the administrative law judge again found rebuttal pursuant to Section 727.203(b)(2), and then found that entitlement was not established at 20 C.F.R. §410.490. Accordingly, benefits were again denied. On appeal, claimant contends that the administrative law judge erred in weighing the medical opinion evidence of record pursuant to 20 C.F.R. §727.203(b)(2) and in considering the evidence at 20 C.F.R. §410.490. Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to this appeal.

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 applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Upon considering the medical opinion evidence pursuant to 20 C.F.R. §727.203(b)(2), the administrative law judge considered all of the medical opinions of record and permissibly gave Dr. Selby's opinion the most weight as it is the most recent opinion. See Employer's Exhibit 9; *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). However, Dr. Selby did not find that claimant is not totally disabled from any cause. Thus, this opinion is not sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2). See *Wetherill, supra*. As a result, the administrative law judge's findings at 20 C.F.R. §727.203(b)(2) are vacated.

Subsequent to the administrative law judge's Decision and Order on Remand, the Supreme Court held that all of the rebuttal methods contained in 20 C.F.R. §727.203(b) are valid. See *Pauley v. Bethenergy Mines Inc.*, 111 S.Ct. 2524, 15 BLR 2-155 (1991). In the instant case, the opinions of Drs. Selby and Campbell, both of whom found that claimant's impairment is not related to his coal mine employment, are sufficient to support rebuttal pursuant to 20 C.F.R. §727.203(b)(3). See Director's Exhibit 21; Employer's Exhibit 9. The administrative law judge permissibly accorded greater weight to these opinions based on the recency of Dr.

Selby's opinion and the superior qualifications of both physicians. See *Wilt, supra*; *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990). Moreover, the administrative law judge permissibly relied on Dr. Selby's opinion to find rebuttal pursuant to 20 C.F.R. §727.203(b)(3) in his first Decision and Order. See Decision and Order at 13; *Scott, supra*. Thus, we hereby reinstate the administrative law judge's prior findings at 20 C.F.R. §727.203(b)(3), and find rebuttal of the presumption established thereunder.

Regarding the administrative law judge's findings at 20 C.F.R. §410.490, in light of the Supreme Court's holding in *Pauley*, the Board has held that a claim which is properly adjudicated pursuant to 20 C.F.R. §727.203 is not subject to adjudication pursuant to 20 C.F.R. §410.490. *Whiteman v. Boyle Land and Fuel Company*, 15 BLR 1-11 (1991). Since the administrative law judge properly adjudicated this claim pursuant to 20 C.F.R. §727.203, the administrative law judge's findings pursuant to 20 C.F.R. §410.490 are vacated. See *Pauley, supra*; see also *Whiteman, supra*.

Accordingly, the administrative law judge's Decision and Order on remand is vacated in part, and the denial of benefits is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge