BRB No. 92-0525 BLA

WILLIAM F. CURRY)
)
Claimant-Petitioner)
)
v.)
)
BEATRICE POCAHONTAS COAL)
COMPANY)
) DATE ISSUED:
Employer-Respondent)
)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER *EN BANC*

Appeal of the Decision and Order of Giles J. McCarthy, Administrative Law Judge, United States Department of Labor.

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

Douglas A. Smoot and Melissa M. Robinson (Jackson & Kelly), Charleston, West Virginia, for employer.

Anne Swiatek (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: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

DOLDER, Acting Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (87-BLA-2570) of Administrative Law Judge Giles J. McCarthy 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 before the Board for the third time. Claimant filed a claim on May 26, 1978, and Administrative Law Judge Stuart Levin issued a Decision and Order denying benefits on January 18, 1980. In his Decision and Order, Administrative Law Judge Levin found that claimant established twenty-seven and one-

half years of coal mine employment and accepted employer's concession that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Administrative Law Judge Levin then found that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(1). Accordingly, benefits were denied. Claimant filed a motion for reconsideration, which was denied by Administrative Law Judge Levin on April 2, 1980. Claimant then filed an appeal with the Board seeking modification of the administrative law judge's denial of benefits. The Board denied claimant's request for modification and informed claimant that requests for modification should be made directly to the administrative law judge. *Curry v. Beatrice Pocahontas Co.*, 3 BLR 1-306 (1981). Claimant's subsequent requests for modification and reconsideration were denied. Claimant then filed a second appeal with the Board. On appeal, the Board affirmed the Administrative Law Judge Levin's finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(1) and, accordingly, the Decision and Order, Order Denying Reconsideration, Order Denying Modification and Order Denying Reconsideration of Modification were affirmed. *Curry v. Beatrice Pocahontas Co.*, BRB Nos. 80-389 BLA and 82-987 BLA (November 30, 1984)(unpub.).

Claimant filed a second claim for benefits on January 10, 1985. Claimant also filed a request for Modification of the Board's Decision and Order. The district director, after determining that claimant's second claim was a request for modification, denied the request on November 19, 1986. After a formal hearing, Administrative Law Judge McCarthy found that claimant established twenty-eight years of coal mine employment and that invocation of the interim presumption was established pursuant to 20 C.F.R. §727.203(a)(1) as set forth in Judge Levin's Decision and Order. The administrative law judge then determined that rebuttal under 20 C.F.R. §727.203(b)(1) is not applicable in this case as claimant retired from coal mine employment in January 1981, and that rebuttal was not established pursuant to 20 C.F.R. §727.203(b)(2). The administrative law judge further found that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(3) and (4), and that claimant failed to establish entitlement pursuant to 20 C.F.R. §410.490 and 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to consider the evidence of record pursuant to 20 C.F.R. §727.203(a)(2) and (4), and in failing to find rebuttal at Section 727.203(b)(4) precluded since invocation of the interim presumption was established at Section 727.203(a)(1). Additionally, claimant contends that the administrative law judge erred in finding the evidence of record sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3) and (4). Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation

Programs (the Director), also responds urging affirmance of the administrative law judge's Decision and Order. Oral argument in this case was heard by the Board in Charleston, West Virginia on October 13, 1993.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are 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, claimant contends that the administrative law judge erred in failing to consider invocation of the interim presumption pursuant to Section 727.203(a)(2) and (4). The administrative law judge, in finding that invocation was established, accepted Administrative Law Judge Levin's weighing of the x-ray evidence and his acceptance of employer's concession that invocation was established pursuant to Section 727.203(a)(1). The administrative law judge's finding of invocation pursuant to Section 727.203(a)(1) has not been challenged on appeal, thus, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). As the administrative law judge's finding of invocation pursuant to Section 727.203(a)(1) is affirmed, we need not address claimant's contentions regarding Section 727.203(a)(2) and (4). *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Claimant next contends that it was an error of law

> for the administrative law judge to find rebuttal pursuant to Section 727.203(b)(4) when he found that the interim presumption had been invoked by x-ray evidence pursuant to Section 727.203(a)(1). Based on the facts of the instant case and current law, we agree with claimant. In *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 108 S.Ct. 427, 435-36 n.26, 11 BLR 2-1, 2-9 n.26 (1987), the United States Supreme Court stated:

if the claimant invokes the presumption by establishing the existence of

pneumoconiosis under § (a)(1), the employer may not try to disprove pneumoconiosis under § (b)(4). This limitation on rebuttal, according to the Court of Appeals, renders the Secretary's position internally inconsistent.

Again, we are constrained to disagree. Nothing in the regulation *requires* each rebuttal subsection to be fully available in each case. As long as the employer can introduce, say, nonqualifying X-rays at the invocation stage to oppose invocation under § (a)(1), it has been given the chance to show the nonexistence of pneumoconiosis. If the presumption is nonetheless

invoked, the employer can still try to disprove total disability or causality.

Mullins, 108 S.Ct. at 435-36, 11 BLR at 2-9.

The Supreme Court further stated that "after a Subsection (a)(1) invocation, the question of pneumoconiosis is effectively closed: the rebutting party cannot, as a practical matter, attempt to show that the miner does not suffer from some form of clinical pneumoconiosis." *Mullins*, 108 S.Ct. at 436 n. 26, 11 BLR at 2-9 n. 26. In light of *Mullins*, the Board held in *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988), that subsection (b)(4) rebuttal is precluded where the administrative law judge finds invocation under subsection (a)(1). *Buckley*, 11 BLR at 1-38. In response to claimant's contention, employer asserts that the Board's reliance on *Mullins* is incorrect as the above quoted language is dicta, and that precluding rebuttal at subsection (b)(4) would result in the administrative law judge's failure to consider all relevant evidence. Employer's Brief at 18. The Director responds stating that, contrary to employer's position, the comments made in *Mullins* are not merely dicta, as *Mullins* limits rebuttal at subsection (b)(4) by holding that subsection (b)(4) rebuttal can not be established by the same type of evidence which was considered to invoke at subsection (a)(1). The Director, however, argues that *Mullins* does not preclude the opposing party from relying on different evidence to establish subsection (b)(4) rebuttal. Director's Brief at 6. Neither employer nor the Director, however, has presented a compelling argument for the Board to alter its position on this issue. As noted above, the Supreme Court in *Mullins* clearly held that rebuttal pursuant to subsection (b)(4) is precluded by a finding of invocation pursuant to subsection (a)(1). Thus, notwithstanding employer's arguments to the contrary, the Supreme Court's pronouncement on this issue cannot be considered dicta, and is, in fact, binding authority on the Board and all parties seeking benefits under the Act. *Buckley*, *supra*; *see also Old Ben Coal Co. v. Battram*, 7 F.3d 1273 n. 4, BLR (7th Cir. 1993); *Cort v. Director, OWCP*, 996 F.2d 1549, 1551 n. 3, 17 BLR 2-166 (3d Cir. 1993); *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990). The contrary arguments of employer and the Director on this issue are therefore rejected, and we hereby hold that, pursuant to *Mullins,* a finding of invocation pursuant to subsection (a)(1) precludes a finding of rebuttal under (b)(4). As a result, the administrative law judge's finding that employer established rebuttal pursuant to Section 727.203(b)(4) is vacated.

Claimant next contends that the evidence of record is insufficient to support a finding of rebuttal pursuant to Section 727.203(b)(3).[1] The United States Court of

[1]The administrative law judge's finding that rebuttal is not established pursuant to 20 C.F.R. §727.203(b)(2) is affirmed as it is not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Appeals for the Fourth Circuit, the jurisdiction in which this claim arises, has held that in order to establish rebuttal of the interim presumption pursuant to subsection (b)(3), the party opposing entitlement must rule out any relationship between the miner's disability and coal mine employment. *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). In making his findings pursuant to subsection (b)(3), the administrative law judge stated that he considered all of the medical opinion evidence of record. The administrative law judge then permissibly accorded great weight to the opinion of Dr. Endres-Bercher, who diagnosed that claimant does not have any pulmonary disability and retains sufficient lung capacity to perform his previous employment as a supply man, because it is well reasoned and well supported by findings on physical examination as well as objective test results. Decision and Order at 18; Employer's Exhibit 5; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Marcum v. Director, OWCP*, 11 BLR 1-2 (1987); *Wetzel*, *supra*. The administrative law judge further permissibly found Dr. Endres-Bercher's report to be supported by the report of Dr. Fino, who opined that "pneumoconiosis has not caused any disability and has not contributed at all to a disability should one be found", as it is well reasoned and well supported by objective medical evidence.[2] Decision and Order at 19; Employer's Exhibit 7; *see Lafferty*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel*, *supra*. The administrative law judge then permissibly found that the opinions of Drs. Endres-Bercher and Fino outweigh Dr. Rupke's opinion, which states that claimant is totally disabled due to his pneumoconiosis, as Dr. Rupke fails to provide a discussion as to the basis for his diagnosis. Decision and Order at 18-19; Director's Exhibit 82; *Lafferty*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). As a result, the administrative law judge's finding that employer established rebuttal pursuant to Section 727.203(b)(3) is affirmed as supported by substantial evidence.

[2]The administrative law judge also noted that Dr. Abernathy's report concluding that claimant's impairment was not due to coal dust exposure and that claimant had the capacity to do coal mine employment supports the opinion of Dr. Endres-Bercher. Decision and Order at 18; Director's Exhibit 85.

Accordingly, the administrative law judge's findings are vacated in part and affirmed in part, and the administrative law judge's Decision and Order Rejection of Claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

Brown, Administrative Appeals Judge, concurring and dissenting:

I concur in the affirmance of the Decision and Order of the administrative law judge denying benefits. Invocation of the interim presumption of total disability due to pneumoconiosis was established pursuant to 20 C.F.R. §727.203(a)(1) as a result of the employer's concession. Therefore, it was not necessary to consider invocation pursuant to 20 C.F.R. §727.203(a)(2) and (4). I further agree that rebuttal was established pursuant to 20 C.F.R. §727.203(b)(3) as a result of the administrative law judge's weighing of all the medical opinion evidence as discussed in the main opinion. The conclusion of the administrative law judge that employer ruled out any relationship between the miner's disability and coal mine employment is supported by substantial evidence.

The area where I differ from my colleagues, however, is in the handling of rebuttal pursuant to 20 C.F.R. §727.203(b)(4) when invocation arose pursuant to Section 727.203(a)(1), as in this case. In their opinion Judges Dolder and Smith have taken the position, flatly, that rebuttal at Section 727.203(b)(4) is precluded if invocation is established pursuant to Section 727.203(a)(1), citing *Mullins Coal Co., Inc of Virginia v. Director, OWCP*, 108 S.Ct. 427, 11 BLR 2-1 (1987). Employer asserts the position, on the other hand, that the comments made by the Supreme Court relating to subsections (a)(1) and (b)(4) is not a holding by the Court, was simply dicta, and that rebuttal pursuant to subsection (b)(4) is not necessarily precluded where there is appropriate evidence other than that of the kind which constituted the basis for the establishment of invocation pursuant to subsection (a)(1). The Director's position is that the relevant comments in *Mullins* are not dicta, as asserted by the employer, but that rebuttal may be established at subsection (b)(4) if the party asserting it relies on evidence different from the type considered to invoke at subsection (a)(1).

Are these comments in *Mullins* concerning Section 727.203(a)(1) and (b)(4) dicta or are they not? As Justice Stevens, who wrote the opinion, stated in the opening paragraph:

> "The question in this case concerns the burden of proof that the claimant must satisfy to invoke the presumption. The Court of Appeals held, *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424 (CA4 1986)(*en banc*)(case below), that a single item of qualifying evidence is always sufficient whereas the Secretary of Labor contends that his regulation requires the claimant to establish at least one of the five qualifying facts by a preponderance of the evidence. Because we are not persuaded that the Secretary has misread his own regulation, we reverse."

Mullins, 108 S. Ct. at 429, 11 BLR at 2-3.

Justice Stevens went on to say that it was the view of the Court of Appeals that invocation of the interim presumption under Section 727.203 (a)(1), (2) or (3) is established where there is credible evidence that a qualifying x-ray indicates the presence of pneumoconiosis, a single qualifying ventilatory study indicates a chronic respiratory or pulmonary disease, or a single blood gas study indicates pursuant to the regulatory standard an impairment in the transfer of oxygen from the lungs to the blood. In contrast, the Secretary's view is that invocation under any subpart must be by a preponderance of the evidence. Justice Stevens pointed out that prior to *Stapleton* the Courts of Appeals had routinely reviewed for substantial evidence the fact-finder's determination under a preponderance of the evidence standard. The actual holding in *Mullins* was the adoption of the Secretary's preponderance of the evidence standard to establish invocation and the reversal of the judgment of the Court of Appeals. This holding was repeated by the majority of the Supreme Court as its final thought in the case in its footnote 35, wherein it stated that because it agreed that the regulation requires a claimant to prove an invocation fact by a preponderance of the evidence, it need not pass on petitioner's alternative argument that the Administrative Procedures Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act 5 U.S.C. §554(c)(2), 33 U.S.C. §§919(d) and 932(a), also requires proof by a preponderance of the evidence. In referring to the issue raised by the holding of the Court of Appeals, Justice Stevens stated: "that presents the legal question we must decide." *Mullins,* 108 S.Ct. at 430, 11 BLR at 2-4 (1987). The holding in

Mullins is limited solely to the issue of invocation. What it takes to rebut was not litigated in any manner. Considering the narrow manner in which Justice Stevens defined the legal question before the Court, it is obvious that the discussion pertaining to subsections (a)(1) and (b)(4) has the earmarks of classic dicta.

The question now presented is whether rebuttal under Section 727.203 (b)(4) is precluded if invocation was established pursuant to Section 727.203 (a)(1). In *Mullins* the comment was made that the Court of Appeals was persuaded that some of the rebuttal provisions would be superfluous under the Secretary's reading, that is, that if there is invocation under subsection (a)(1), the employer may not try to disprove pneumoconiosis under subsection (b)(4). *Mullins,* 108 S.Ct. at 430, 11 BLR at 2-4 (1987). The Court then referred in its footnote 26 to a comment in the Federal Respondents brief that "[b]ased on current medical knowledge, X-ray, biopsy, and autopsy evidence are today the only reliable evidence for diagnosing pneumoconiosis. Therefore, after a Subsection (a)(1) invocation, the question of pneumoconiosis is effectively closed; the rebutting party cannot, as a practical matter, attempt to show that the miner does not suffer from some form of clinical pneumoconiosis." Brief for Federal Respondent 24, n.22; *Mullins* 108 S.Ct. 436 n. 26, 11 BLR 2-9 n. 26. Conspicuously absent from the Secretary's quotation, however, is any specific reference to medical or scientific authority to substantiate the assertions that x-ray, biopsy, and autopsy evidence are today the only reliable evidence for diagnosing pneumoconiosis. Are all medical opinions to be considered unreliable? Furthermore, we now know that use is being made of a more sophisticated procedure to determine the presence or absence of pneumoconiosis. See *Melnick v. Consolidated Coal Company*, 16 BLR 1-31 (1991) (in which the Board recognized that a CAT scan [computerized axial tomography] was a procedure distinguishable from x-rays and a means other than x-ray, biopsy or autopsy to determine the presence or absence of pneumoconiosis). The recent and selected use of CAT scans in connection with Black Lung claims apparently was never asserted in any of the briefs submitted to the Supreme Court.

It is the view of the Director that the decision in *Mullins* does not require the conclusion that subsection (b)(4) rebuttal is absolutely foreclosed when invocation has been established by subsection (a)(1). The Director also agrees, along with employer, that precluding subsection (b)(4) rebuttal could, in some cases, be a violation of Section 413 (b) of the Act, which requires that all relevant evidence be considered in adjudicating claims. 30 U.S.C. §923(b). The Director's position is that invocation under subsection (a)(1), with the use of x-ray, biopsy or autopsy evidence precludes the use of this type of evidence at subsection (b)(4) and that an employer, therefore, cannot establish the absence of clinical pneumoconiosis, *i.e.*, a dust disease of the lungs. However, the Director agrees that medical opinion evidence is admissible on rebuttal at subsection (b)(4) to establish the absence of "legal

pneumoconiosis", *i.e.*, a disease "arising out of coal mine employment [which] includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201. The Director asserts that in a subsection (a)(1) situation, an employer can rebut the presumption with a different form of evidence which proves that the miner's pneumoconiosis is not pneumoconiosis as defined in the regulations: a dust disease of the lungs *arising out of coal mine employment*. With this same thought in mind, employer takes the position that the pneumoconiosis established pursuant to subsection (a)(1) can be rebutted by medical opinions at subsection (b)(4) which, if credited, establish that the "pneumoconiosis" did not arise from coal mine employment but actually was, as an example, asbestosis due to shipyard employment. Other examples would be silicosis due to foundry work or siderosis due to iron work.

In view of the limited holding in *Mullins*, and the conclusion that the discussion therein concerning Section 727.203(a)(1) and (b)(4) is dicta, it is my opinion, contrary to *Buckley v. Director, OWCP*, 11 BLR 1-37 (1987), that invocation pursuant to subsection (a)(1) does not preclude rebuttal pursuant to subsection (b)(4) where there is medical evidence which, if credited, establishes that the pneumoconiosis indicated by the subsection (a)(1) evidence is actually a disease that is not related to coal mine employment. Furthermore, such rebuttal would not be foreclosed if there is evidence, such as a CAT scan, or procedure other than x-ray, biopsy or autopsy, or medical opinions, that, if credited, and if deemed to be more reliable than the subsection (a)(1) evidence, establishes that pneumoconiosis is not present. I would hold that in an appropriate case such evidence should be considered to determine whether subsection (b)(4) rebuttal has been established. It is not necessary, however, to consider the evidence in this case under subsection (b)(4) since rebuttal has been established pursuant to Section 727.203(b)(3), and we are affirming the denial of benefits on this basis.

JAMES F. BROWN
Administrative Appeals Judge

McGRANERY, J., concurring and dissenting:

I concur with all my colleagues in holding that the administrative law judge properly denied benefits because employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(3). But I dissent from the opinion of Judges Dolder and Smith, upholding

Buckley v. Director, OWCP, 11 BLR 1-37 (1987), and I concur in the opinion of Judge Brown, holding that the language of the Supreme Court in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 108 S.Ct. 427, 11 BLR 2-1 (1987), regarding invocation pursuant to 20 C.F.R. §727.203(a)(1) and rebuttal pursuant to 20 C.F.R. §727.203(b)(4) is dictum. In his dissent, Judge Brown lucidly discusses the pertinent language in *Mullins* which makes plain that the holding is limited to "the burden of proof that the claimant must satisfy to invoke the presumption." *Mullins*, 108 S.Ct. at 429, 11 BLR at 2-3.

I write separately, however, to discuss the fundamental unsoundness of both the Board's position in *Buckley*, maintaining that the Supreme Court held in *Mullins* that Section 727.203(a)(1) invocation always precludes rebuttal pursuant to Section 727.203(b)(4), and the Director's position in the case at bar, that subsection (a)(1) invocation precludes a finding at subsection (b)(4) that claimant did not suffer from clinical pneumoconiosis. Both positions are violative of the Act, 30 U.S.C. §932(b), because they authorize the exclusion of relevant evidence and both positions are unwise, because they hinge a legal judgment upon the development of medical science at the time of the Supreme Court's decision.

Both the Board's position in *Buckley* and the Director's position here violate the directive in Section 413(b) of the Act that "all relevant evidence shall be considered". 30 U.S.C. §923(b). The Director recognizes this flaw in the *Buckley* analysis but not in her own. Although she maintains that the opposing party may introduce evidence at subsection (b)(4), she would limit that evidence to proof that claimant's clinical pneumoconiosis did not arise out of coal mine employment. Hence, in the case at bar, she would preclude the administrative law judge from considering medical opinions at subsection (b)(4) because the doctors rejected the view that claimant had clinical pneumoconiosis, although the administrative law judge had found those opinions persuasive. Thus, the Director would exclude from consideration evidence relevant to the fundamental issue of the existence of pneumoconiosis. Because both the Board's position in *Buckley* and the Director's position here violate the statutory mandate to consider all relevant evidence, they cannot be upheld.

Moreover, both these positions are unwise because they base a legal judgment with prospective effect upon medical knowledge current at the time the Supreme Court judgment was issued. Both the Board in *Buckley* and the Director discuss footnote 26 of *Mullins,* in which the Supreme Court quotes the Department of Labor's brief that

> Based on *current medical knowledge*, X-ray, biopsy, and autopsy evidence are *today* the only reliable evidence for diagnosing

> pneumoconiosis. Therefore, after a Subsection (a)(1) invocation, the question of pneumoconiosis is effectively closed; the rebutting party cannot, *as a practical matter*, attempt to show that the miner does not suffer from some form of clinical pneumoconiosis. Brief for Federal Respondent 24, n. 22; *Mullins* 108 S.Ct. at 436 n. 26, 11 BLR at 2-9 n. 26 (emphasis added).

But the Board in *Buckley* and the Director have failed to understand that the Court did not attempt in that footnote to render a prospective judgment. Its discussion was limited to "current medical knowledge", available "today" which would foreclose subsection (b)(4) rebuttal after subsection (a)(1) invocation "as a practical matter." The Court did not assert that subsection (b)(4) rebuttal was precluded as a legal matter. That is the effect of the Board's decision in *Buckley*; also, to some extent, the effect of the Director's position. The Court was not so short-sighted as to suggest that medical knowledge could not grow and that "as a practical matter" it would never be possible to rebut a finding of clinical pneumoconiosis. The positions advanced by the Board in *Buckley* and by the Director would consign the parties in Black Lung cases to a time warp of the year 1987 (when *Mullins* was issued), by prohibiting those opposing entitlement from introducing evidence developed as a result of advances in medical science since 1987.[3] This was never intended by the Supreme Court in its decision.

I think the Court's language in *Mullins* makes plain that its discussion of the availability of rebuttal pursuant to subsection (b)(4) is dictum. This position is reinforced by recognition that to hold otherwise would necessitate contravening the statutory mandate to consider all relevant evidence and would be basically unsound by precluding the possibility of developments in medical science. For these reasons, I must dissent from my colleagues who would uphold *Buckley*.

REGINA C. McGRANERY
Administrative Appeals Judge

[3]This prohibition is particularly troublesome in the instant case because employer conceded invocation pursuant to 20 C.F.R. §727.203(a)(1) in 1980, and when employer sought to withdraw its concession in 1991, it was prohibited from doing so.