BRB Nos. 03-0741 BLA
and 03-0741 BLA-A

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| LESLIE WHITMAN | ) | |
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| Claimant-Respondent | ) | |
| Cross-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| PEABODY COAL COMPANY | ) | DATE ISSUED: 07/23/2004 |
| | ) | |
| and | ) | |
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| OLD REPUBLIC INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| Cross-Respondents | ) | |
| | ) | |
| 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 Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

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

Timothy S. Williams (Howard M. 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/carrier (employer) appeals and claimant cross-appeals from the July 7, 2003 Decision and Order on Remand Awarding Benefits (84-BLA-9098) of Administrative Law Judge Linda S. Chapman 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] This case is before the Board for the sixth time. Most recently, the Board vacated the September 12, 2000 Decision and Order of Administrative Law Judge Paul H. Teitler and remanded the case. *Whitman v. Peabody Coal Co.*, BRB No. 01-0130 BLA (Dec. 19, 2001)(unpublished). The Board instructed the administrative law judge to admit "such further evidence into the record as is necessary in order to protect the procedural due process rights of both parties, including rebuttal evidence." *Whitman*, slip op. at 4. Noting that the administrative law judge's consideration of any new evidence may affect prior credibility determinations, the Board vacated Judge Teitler's findings on invocation of the interim presumption at 20 C.F.R. §727.203(a) (2000) and on rebuttal at 20 C.F.R. §727.203(b) (2000). On the merits of the claim, the Board agreed with employer's argument that the administrative law judge had misconstrued the x-ray evidence at 20 C.F.R. §727.203(a)(1) (2000). Because of errors in Judge Teitler's findings on rebuttal at 20 C.F.R. §727.203(b)(3) (2000), the Board specifically vacated that finding. The Board further vacated Judge Teitler's designation of April 21, 1981 as the appropriate day upon which benefits, if awarded, would commence and instructed the administrative law judge to reconsider this issue on remand, if reached. Lastly, the Board ordered that the case be reassigned to a different administrative law judge on remand, given the "extraordinary circumstances of this case and the length of time which has elapsed since the filing of the claim…." *Whitman*, slip op. at 7.

On remand, Administrative Law Judge Linda S. Chapman (the administrative law judge) admitted additional evidence and awarded benefits. The administrative law judge found that the evidence established invocation at 20 C.F.R. §727.203(a)(2) (2000) and did not establish rebuttal at 20 C.F.R. §727.203(b)(1) – (b)(4) (2000). Accordingly, benefits were awarded. The administrative law judge also found that April 1981 was the appropriate

[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.

month for the commencement of benefits.

On appeal, employer alleges error in the administrative law judge's findings on invocation at 20 C.F.R. §727.203(a)(2) (2000) and rebuttal at 20 C.F.R. §727.203(b)(3) and (b)(4) (2000). Employer also asserts that the administrative law judge erred in designating April 1, 1981 as the appropriate date upon which benefits commence. Lastly, employer argues that even if claimant were to establish his entitlement to benefits, transfer of liability for the payment of benefits to the Black Lung Disability Trust Fund (Trust Fund) is warranted because nearly three decades have passed since the filing of the claim in 1978. Employer's Brief at 28. Claimant responds to employer's appeal, and seeks affirmance of the decision below. In his cross-appeal, claimant alleges error in the administrative law judge's finding that the x-ray evidence is insufficient to establish invocation at 20 C.F.R. §727.203(a)(1) (2000). The Director, Office of Workers' Compensation Programs (the Director), has filed a response to both appeals. The Director takes no position on the merits of the case, but argues against employer's assertion that any liability for the payment of benefits should transfer to the Trust Fund. Employer has filed a combined brief in response to claimant's cross-appeal and in reply to the Director's response brief.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

**Invocation of the Interim Presumption at 20 C.F.R. §727.203(a)(2) (2000)**

Employer contends that the administrative law judge found invocation established by relying on two isolated pulmonary function studies, namely Dr. O'Bryan's pulmonary function study dated February 8, 2000 and Dr. Calhoun's pulmonary function study dated April 21, 1981, and disregarded all the contrary evidence. Employer also suggests that these qualifying pulmonary function studies show impairment due to age.[2] Employer notes that 20 C.F.R. Part 718, Appendix B only covers miners up to the age of seventy-one, and claimant was 77 when he performed the February 8, 2000 pulmonary function study.

Employer's arguments lack merit. The record shows that the administrative law judge thoroughly considered each pulmonary function study and any corresponding reports, and considered this evidence as a whole. Further, Part 718, Appendix B is not determinative of

[2] Claimant was born on April 8, 1923. Director's Exhibit 1. Claimant was seventy-nine years old at the time of the November 21, 2002 hearing before the administrative law judge. Hearing Transcript at 20.

the issue of which pulmonary function studies produced qualifying values.[3] Moreover, the applicable regulation at 20 C.F.R. §727.203(a)(2) (2000) contains no age factor.

Employer argues that, notwithstanding Dr. Kraman's validation of the April 21, 1981 pulmonary function study, *see* Director's Exhibit 9, the study is not valid because it does not conform to the applicable quality standards at 20 C.F.R. Part 718, Appendix B (2)(ii)(G) where there is excessive variability between the three acceptable curves for the FEV1 value. Employer asserts that Dr. Anderson invalidated the pulmonary function study on this basis. Employer's Brief at 17.

Employer's argument lacks merit. As an initial matter, Dr. Anderson did not review the April 21, 1981 pulmonary function study but reviewed the June 10, 1986 pulmonary function study of Dr. Pitzer. Employer's Exhibit 4. The record contains no medical doctor's interpretation invalidating the April 21, 2001 pulmonary function study and we reject employer's own attempt to do so.

Employer next asserts that the administrative law judge mischaracterized, as qualifying, the 2.41 after-bronchodilator FEV1 value on the February 8, 2000 pulmonary function study.

The table contained at 20 C.F.R. §727.203(a)(2) (2000) lists a claimant's height measurement in whole numbers. This regulation makes no provision for the consideration of a claimant, such as the claimant in the instant case, whose height measurement is reported in other than whole numbers such as sixty-nine and one-half inches. *See* Administrative Law Judge's Exhibit 3. We hold that the administrative law judge permissibly applied the table values for a seventy-one inch claimant to the February 8, 2000 pulmonary function study, resolving "in favor of coverage" under the Act the issue of whether this pulmonary function study resulted in qualifying values. *See Amax Coal Co. v. Anderson*, 771 F.2d 1011, 1015, 8 BLR 2-40, 2-45 (7th Cir. 1985), *aff'g Anderson v. Amax Coal Co.*, 5 BLR 1-616 (1983). In order to qualify, the corresponding FEV1 value must be "[e]qual to or less than-" 2.5. 20 C.F.R. §727.203(a)(2) (2000). Because the reported value of 2.41 is less than 2.5, the post-bronchodilator FEV1 value on the February 8, 2000 pulmonary function study is qualifying,

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[3] In claims filed under 20 C.F.R. Part 727, the regulation at 20 C.F.R. §727.203(a)(2) (2000) determines whether or not a pulmonary function study is qualifying. In claims filed under 20 C.F.R. Part 727, the quality standards to determine whether or not a pulmonary function study is conforming, are found at 20 CF.R. Part 410, Subpart D for studies submitted prior to the effective date of the 20 C.F.R. Part 718 regulations (March 31, 1980) and at 20 C.F.R. Part 718, Appendix B for studies submitted thereafter. *See* 20 C.F.R. §727.206(a) (2000).

as the administrative law judge permissibly determined.[4] Based on the foregoing, we affirm the administrative law judge's finding of invocation of the interim presumption at 20 C.F.R. §727.203(a)(2) (2000).

**Rebuttal of the Interim Presumption at 20 C.F.R. §727.203(b)(3) (2000)**

Employer contends that the administrative law judge applied the wrong standard in determining that the evidence is insufficient to establish rebuttal at 20 C.F.R. §727.203(b)(3) (2000). Employer asserts that the administrative law judge erroneously indicated that a physician's opinion to the effect that a miner has no respiratory impairment is insufficient to establish rebuttal at 20 C.F.R. §727.203(b)(3) (2000). Employer also argues that the administrative law judge erroneously relied on the decision of the United States Court of Appeals for the Fourth Circuit in *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984) and mischaracterized it as precedent of the United States Court of Appeals for the Sixth Circuit, under whose jurisdiction this case arises.

Employer's contention that the administrative law judge applied the wrong standard at 20 C.F.R. §727.203(b)(3) (2000) has merit. At 20 C.F.R. §727.203(b)(3) (2000), it is employer's burden to prove that claimant's total disability did not arise, in whole or in part, out of coal mine employment; that pneumoconiosis played no part in claimant's total disability. *Youghiogheny & Ohio Coal Co. v. McAngues*, 996 F.2d 130, 17 BLR 2-146 (6th Cir. 1993), *cert. denied*, 510 U.S. 1040 (1994); *Warman v. Pittsburg & Midway Coal Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985). Thus, if pneumoconiosis is at least a contributing cause of claimant's total disability, he is conclusively entitled to benefits. *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 19 BLR 2-123 (6th Cir. 1995). The administrative law judge in the instant case purports to have applied this standard. *See* Decision and Order at 18. The administrative law judge, however, also applied the "rule out" standard enunciated by the Fourth Circuit in *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984)(employer must rule out the causal relationship between the miner's total disability and his coal mine employment in order to establish rebuttal at 20 C.F.R. §727.203(b)(3)), mistakenly attributing *Massey* to the Sixth Circuit. Decision and Order at 19. The administrative law judge also mistakenly indicated that the Sixth Circuit in *McAngues* adopted the "rule out" standard. *Id.* at 18.

Employer further assigns specific error to the administrative law judge's weighing of

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[4] In a footnote, the administrative law judge correctly noted that the reported 2.41 FEV1 post-bronchodilator value on the February 8, 2000 pulmonary function study would not qualify for a miner sixty-nine inches tall. 20 C.F.R. §727.203(a)(2) (2000); Decision and Order at 13 n.15. Rather, the 2.41 value would exceed the reference value, 2.4, by .01. *Id.*

the medical opinions on rebuttal at 20 C.F.R. §727.203(b)(3) (2000). The administrative law judge found that the opinions of Drs. Gallo, Getty, O'Bryan, and Powell were insufficient to carry employer's burden at 20 C.F.R. §727.203(b)(3) (2000).[5] Employer argues that even if Dr. Getty's opinion does not, by itself, establish rebuttal at 20 C.F.R. §727.203(b)(3) (2000), it does not weigh against such a finding, as the administrative law judge determined. Employer asserts that while Dr. Getty opined that claimant's chronic bronchitis-related cough "could be most likely caused by coal dust inhalation," Director's Exhibit 25 at 8, he did not find that claimant was disabled by this cough and concluded that claimant had no significant pulmonary impairment. Employer also asserts that the administrative law judge misinterpreted the opinions of Drs. Gallo and Powell as not ruling out a pulmonary impairment, where the physicians opined that claimant did not have any significant pulmonary impairment.

We find persuasive employer's argument that the administrative law judge's findings that claimant had no significant pulmonary impairment, rendered by Drs. Getty, Gallo, and Powell, imply that these physicians found some degree of impairment. *See* Decision and Order at 17, 19. The administrative law judge construed these physicians' findings that claimant had no significant impairment as opinions that the physicians found some impairment, without considering these statements in the context of the opinions in which they were reported. *Id.* Moreover, the administrative law judge did not provide an explanation for her finding that Dr. Gallo's conclusions are equivocal. Administrative Procedure Act (APA), 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Based on the foregoing, we vacate the administrative law judge's finding at 20 C.F.R. §727.203(b)(3) (2000) and further remand the case. On remand, the administrative law judge must make complete findings at 20 C.F.R. §727.203(b)(3) (2000) based on the sufficiency, weight, and credibility of all the relevant evidence of record and determine whether it proves rebuttal by establishing that claimant's presumed total disability did not arise in whole or in part out of his coal mine employment. *Warman*, 839 F.2d at 259-261, 11 BLR at 2-67, quoting *Gibas*, 748 F.2d at 1120, 7 BLR at 2-65.

Employer contends that the administrative law judge erroneously interpreted Dr. O'Bryan's opinion to support a finding that pneumoconiosis played a role in claimant's impairment and thus the opinion was insufficient to establish rebuttal at 20 C.F.R. §727.203(b)(3) (2000). The administrative law judge found:

> Similarly, Dr. O'Bryan concluded that the Claimant did not have pneumoconiosis, based on the x-ray, and pulmonary function and arterial blood gas testing. Dr. O'Bryan's conclusion that the Claimant's shortness of

[5]Employer correctly argues that the administrative law judge erred in failing to weigh Dr. Anderson's medical opinion. 20 C.F.R. §725.477(b); Employer's Brief at 23.

> breath is primarily due to a mild restrictive ventilatory impairment as a result of his coronary bypass, and an aging lung with subtle pulmonary fibrosis, is equivocal, and not sufficient to establish rebuttal under [20 C.F.R. §727.203 (2000)] subsection (b)(3). Moreover, it does not address the question of whether the Claimant's pneumoconiosis contributed to his total disability.

Decision and Order at 20.

Employer's contention has merit. Specifically, the administrative law judge mischaracterized Dr. O'Bryan's opinion when she found, "Dr. O'Bryan's conclusion that the Claimant's shortness of breath is primarily due to a mild restrictive ventilatory impairment as a result of his coronary bypass, and an aging lung with subtle pulmonary fibrosis, is equivocal, and not sufficient to establish rebuttal under [20 C.F.R. §727.203(b)(3) (2000)]." Decision and Order at 20. While Dr. O'Bryan found "mild to moderate restrictive impairment probably on the basis of previous heart surgery," Administrative Law Judge's Exhibit 3, he did not equivocate when he indicated that claimant's dyspnea was related to age, mild restrictive impairment, and known heart disease, or when he stated that claimant's dyspnea and ventilatory impairment, plus heart disease would preclude him from performing his last coal mine job. Administrative Law Judge's Exhibit 3. Moreover, in his cover letter dated February 8, 2000, Dr. O'Bryan indicated, "I don't think that any of the above diagnoses [referring to dyspnea, mild restrictive ventilatory impairment, aging lung with subtle pulmonary fibrosis], can be traced to his underground/above ground coal mining employment. *Id.* Accordingly, the administrative law judge on remand must reconsider Dr. O'Bryan's opinion based on an accurate account of his findings.

Employer next contends that, contrary to the administrative law judge's indication, invocation of the interim presumption establishes no medical or legal fact, only the presumption that claimant is totally disabled due to pneumoconiosis. After weighing the medical opinions at 20 C.F.R. §727.203(b)(3) (2000) and finding them insufficient to establish rebuttal thereunder, the administrative law judge stated:

> I also note that I have found that the Claimant is entitled to invocation of the interim presumption under [20 C.F.R. §727.203(a)(2) (2000)], by virtue of the qualifying pulmonary function study evidence. Implicit in this finding is the conclusion that the Claimant has a totally disabling respiratory or pulmonary impairment. To credit opinions on rebuttal that deny any impairment would be irreconcilable with this finding. [footnote omitted]

Decision and Order at 20. Employer asserts, "For the ALJ to claim that employer may not rebut a presumption by use of any evidence inconsistent with that presumption is irrational at best." Employer's Brief at 23-24.

We hold that the administrative law judge's comments constitute reversible error. The interim presumption at 20 C.F.R. §727.203(a) (2000) is a rebuttable presumption and claimant, by establishing invocation of the interim presumption at 20 C.F.R. §727.203(a) (2000), has not established the "fact" of his disability. Rather, claimant is presumed to be totally disabled. *Warman*, 839 F.2d at 259-261, 11 BLR at 2-67, quoting *Gibas*, 748 F.2d at 1120, 7 BLR at 2-65.

Employer further argues that the administrative law judge failed to consider the weaknesses in the evidence linking claimant's impairment to his coal mine employment. Employer sets forth several reasons in support of its position that the opinions of Drs. Simpao, West, and Calhoun are not credible.

Employer's contention lacks merit. The Sixth Circuit recognized in *Gibas* that the burden of proof and persuasion on rebuttal is on the party opposing entitlement, which is employer in the instant case. *Gibas*, 748 F.2d at 1120, 7 BLR at 2-65. Moreover, it is within the province of the administrative law judge to determine the weight and credibility of the medical evidence. *Riley v. National Mines Corp.*, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988). We reject employer's contention because it amounts to a request that the Board reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

**Rebuttal of the Interim Presumption at 20 C.F.R. §727.203(b)(4) (2000)**

Employer next challenges the administrative law judge's finding that the evidence is insufficient to establish rebuttal at 20 C.F.R. §727.203(b)(4) (2000). Employer states:

> Having discounted the doctors' opinions that found no significant pulmonary impairment, a flaw which would not preclude consideration under [20 C.F.R. §727.203(b)(4) (2000)], she simply disallows or ignores any evidence that [claimant] does not have pneumoconiosis, on the grounds that such evidence is inconsistent with her presumption that [claimant] has the disease.

Employer's Brief at 26. Employer further argues that the administrative law judge erred by limiting her analysis to the medical opinion evidence and by "crib[ing] from" her analysis of the evidence at 20 C.F.R. §727.203(a)(3) (2000). *Id.* Employer submits that the administrative law judge should have discussed the x-ray and blood gas study evidence since it is relevant to the issue and supports rebuttal.

The Sixth Circuit held, in *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989), that rebuttal at 20 C.F.R. §727.203(b)(4) (2000) differs from rebuttal at 20 C.F.R. §727.203(b)(3) (2000) in that subsection (b)(4) (2000) permits rebuttal if the party opposing entitlement establishes that the miner's respiratory disorder is not significantly related to coal mine employment since 20 C.F.R. §727.202 (2000) requires the

disorder to be significantly related to, or aggravated by, coal mine employment in order for it to be pneumoconiosis. On rebuttal at 20 C.F.R. §727.203(b)(4) (2000), the administrative law judge found that the opinions of Drs. Powell, O'Bryan, Anderson, Gallo, and Getty[6] are insufficient to show the absence of any respiratory or pulmonary impairment arising out of claimant's coal mine employment. Decision and Order at 21-22. The administrative law judge determined that Dr. Powell, who found no significant respiratory impairment, "did not attribute that respiratory impairment, whether it was significant or not, to any source. It is not substantial evidence establishing rebuttal." Decision and Order at 21. This finding by the administrative law judge is inconsistent with *Crisp.*

Further, contrary to the administrative law judge's indication, *see* Decision and Order at 21-22, Dr. O'Bryan explicitly found no diagnosis related to claimant's coal mine employment and did not equivocate in that finding. Administrative Law Judge's Exhibit 3.

With regard to the opinion of Dr. Anderson, the administrative law judge found that the physician's conclusion that claimant had no respiratory impairment conflicted with the administrative law judge's conclusion that claimant established total disability. Decision and Order at 22. The administrative law judge further found that Dr. Anderson did not address the issue of the etiology of any such impairment and thus his opinion did not establish rebuttal at 20 C.F.R. §727.203(b)(4) (2000). The administrative law judge additionally noted that Dr. Gallo "also concluded that the Claimant had no pulmonary dysfunction or disability, and no chronic bronchitis, and thus, his opinions do not provide any help in establishing rebuttal." *Id.*

The record reveals that Dr. Anderson found that the x-ray showed no evidence of pneumoconiosis or silicosis, and that he diagnosed arteriosclerotic heart disease, status post-open heart surgery. Employer's Exhibit 4. Dr. Anderson determined that claimant had zero percent respiratory impairment and twenty to forty-five percent impairment due to heart disease. Director's Exhibit 24. Dr. Gallo interpreted claimant's x-ray as negative for pneumoconiosis and found borderline hypoxemia on the blood gas study for which he did not specify a cause. Director's Exhibit 24. Dr. Gallo's impression was status-post coronary by-pass surgery for coronary artery disease with angina pectoris. *Id.* He stated that he would not restrict claimant from performing his regular coal mine employment. *Id.* Insofar as both Drs. Anderson and Gallo found no x-ray evidence of pneumoconiosis, their opinions support a finding that claimant had no clinical pneumoconiosis, which would support employer's burden on rebuttal at 20 C.F.R. §727.203(b)(4) (2000). The fact that neither physician found claimant to be totally disabled is not determinative of their opinions' relevance on rebuttal, as

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[6] Because Dr. Getty indicated that claimant's chronic bronchitis could be related to his coal mine employment, the administrative law judge properly determined that his opinion is insufficient to establish rebuttal at 20 C.F.R. §727.203(b)(4) (2000).

the administrative law judge found. The issue of rebuttal at 20 C.F.R. §727.203(b)(4) (2000) concerns whether or not the evidence is sufficient to rebut the presumption that claimant has pneumoconiosis, the disease.

Further, employer correctly argues that the administrative law judge erred by not considering all the relevant evidence on rebuttal at 20 C.F.R. §727.203(b)(4) (2000), including the import of the negative weight of the x-ray evidence. Specifically, the administrative law judge found that claimant failed to establish invocation at 20 C.F.R. §727.203(a)(1) (2000) by x-ray evidence, and noted that the record contains no autopsy or biopsy evidence, *see* 20 C.F.R. §727.203(a)(1) (2000). Decision and Order at 12. The administrative law judge thereby determined that the evidence is insufficient to establish invocation based on evidence showing the absence of clinical or medical pneumoconiosis. *See* 20 C.F.R. §727.202 (2000). When the administrative law judge considered rebuttal at 20 C.F.R. §727.203(b)(4) (2000), she considered only the medical opinion evidence and not the relevant objective evidence, namely the x-ray evidence. Based on the foregoing, we vacate the administrative law judge's finding on rebuttal at 20 C.F.R. §727.203(b)(4) (2000) and further remand the case for application of the correct standard on rebuttal and for the administrative law judge to determine the legal sufficiency, weight, and credibility of all the relevant evidence.

In determining the issue of rebuttal at 20 C.F.R. §727.203(b)(3) and (b)(4) (2000), we instruct the administrative law judge on remand to consider the chronology of the relevant evidence in relation to the 1981 and 2000 pulmonary function studies upon which the administrative law judge relied to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(2) (2000). *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988)(the interim presumption would be of little value if it can be rebutted by medical opinions based on examinations conducted at a time before claimant established the conditions required to invoke the presumption.)

**Claimant's Cross-Appeal**

Claimant cross-appeals from the administrative law judge's Decision and Order, alleging error in the administrative law judge's finding that the evidence was insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1) (2000).[7] Claimant contends that it was error for the administrative law judge to admit Dr. Wiot's

[7]We note that a finding of rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4) (2000) is precluded where invocation of the interim presumption is established at 20 C.F.R. §727.203(a)(1) (2000). *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1, 2-9 n.26 (1987), *reh'g denied*, 484 U.S. 1047, 150 n.26 (1988); *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988).

December 29, 2002 report, which consists of interpretations of the x-rays dated August 30, 2002 and October 2, 2002, taken by Dr. Powell that were negative for pneumoconiosis. *See* Administrative Law Judge's Exhibit 9. Claimant argues that employer submitted Dr. Wiot's December 29, 2002 report outside the twenty-day rule set forth at 20 C.F.R. §725.456(b)(1) and that employer had ample opportunity to have claimant evaluated "well before October of 2002." Claimant's Brief at 19. Claimant asserts that for this reason, employer could not show good cause to excuse this report's tardy submission. The record contains two interpretations of the August 30, 2002 x-ray, each submitted by a Board-certified B reader: Dr. Wiot's negative reading and Dr. Brandon's positive reading. Administrative Law Judge's Exhibits 4, 9. The record contains three readings of the October 2, 2002 x-ray: negative readings by Dr. Powell, a B reader, and by Dr. Wiot, a Board-certified B reader, and a positive reading Dr. Brandon, a Board-certified B reader. Administrative Law Judge's Exhibits 7, 9, 10. Claimant submits that his case was prejudiced by the administrative law judge's erroneous admission of Dr. Wiot's December 29, 2002 report where the administrative law judge found that both the August 30, 2002 and October 2, 2002 x-rays, the two most recent of record, were negative for pneumoconiosis. *See* Decision and Order at 12. Claimant argues, "Thus, had Dr. Wiot's opinion not been a matter of record, the Administrative Law Judge would have concluded that the most recent, and therefore most probative, x-ray was positive for pneumoconiosis. It is reasonable to assume that this would have resulted in invocation of the interim presumption under [20 C.F.R. §727.203(a)(1) (2000).]" Claimant's Brief at 20.

At the November 21, 2002 hearing, the administrative law judge conditionally admitted into the record Administrative Law Judge's Exhibit 7, the October 2, 2002 evaluation of claimant by Dr. Powell, a B reader, which includes a negative interpretation of the x-ray dated October 2, 2002. The administrative law judge afforded both claimant and employer thirty days in which to file their rereading of Dr. Powell's x-ray dated October 2, 2002. Hearing Transcript at 15-16. Claimant's counsel indicated that he did object to the granting of employer's request for additional time in which to submit evidence post-hearing and the administrative law judge responded that she would address any objection when and if any rereading was submitted within the thirty days allotted. *Id.* at 16. Additionally, the administrative law judge granted employer's request for thirty days in which to have the August 30, 2002 x-ray reread, which rereading was submitted and is found at Administrative Law Judge's Exhibit 4, and which the administrative law judge conditionally admitted into the record. *Id.* at 13-14. At the end of the hearing, employer's counsel again clarified that his plan was to submit rereadings of the two x-rays at issue and the administrative law judge responded in the affirmative and indicated that she would address any objection to new evidence at the time of submission. *Id.* at 47.

The record shows that Dr. Wiot's December 29, 2002 report was filed with the Office of Administrative Law Judges on March 27, 2003, four months after the November 21, 2002 hearing. Claimant filed his post-hearing brief on June 23, 2003, therein arguing that Dr.

Wiot's interpretation of the October 2, 2002 x-ray was "not properly a part of the record" because the administrative law judge had, at the hearing, allowed employer the opportunity to have the August 30, 2002 x-ray, not the October 2, 2002 x-ray, reread. Claimant thus argued that Dr. Wiot's interpretation of the October 2, 2002 x-ray was outside the scope of the administrative law judge's order at the hearing. Claimant's June 18, 2003 Brief at p. 14 n.2. In his June 18, 2003 brief, however, claimant did not raise any issue invoking the twenty-day rule under 20 C.F.R. §725.456. In her July 7, 2003 Decision and Order, the administrative law judge admitted Administrative Law Judge's Exhibit 9 and did not note any objection by claimant to the admission of this report or address its late submission. Decision and Order at 2.

Based on the facts of this case, we need not address claimant's objection under 20 C.F.R. §725.456 to the administrative law judge's admission of Dr. Wiot's December 29, 2002 report because claimant's specific objection was never raised below. Moreover, the record does not support the objection which claimant did specify in his post-hearing brief, namely that Dr. Wiot's rereading of the October 2, 2002 x-ray was outside the scope of what the administrative law judge allowed employer to submit post-hearing. The record shows that the administrative law judge afforded employer the opportunity to have both the August 30, 2002 and October 2, 2002 x-rays reread.

In light of the foregoing, this case is remanded for the administrative law judge to determine claimant's entitlement to benefits under 20 C.F.R. Part 727 (2000). If, on remand, the administrative law judge finds that claimant is not entitled to benefits under 20 C.F.R. Part 727 (2000), she must then determine claimant's entitlement to benefits under 20 C.F.R. Part 718.

**Date Upon Which Benefits Commence**

Employer next argues that the administrative law judge's designation of April 1, 1981 as the date from which benefits commence was arbitrary and not based on a review of the relevant evidence. The administrative law judge based her finding on the fact that the interim presumption was invoked at 20 C.F.R. §727.203(a)(2) (2000) based on two pulmonary function studies, the earlier of which was Dr. Calhoun's study dated April 21, 1981. The administrative law judge found that Dr. Calhoun based his conclusion that claimant was totally disabled on his x-ray interpretation, physical examination, and the pulmonary function tests. Decision and Order at 22; *see* Director's Exhibit 10.

Employer's contention has merit. The date for commencement of benefits is determined by the date of onset, *i.e.* the month in which the miner's occupational pneumoconiosis progressed to the stage of total disability. 20 C.F.R. §§725.503, 727.302, 727.303; *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). If the date of onset is not

ascertainable from all the relevant evidence of record, then benefits commence with the month during which the claim was filed or review was elected under Section 435 of the Act. 30 U.S.C. §945; 20 C.F.R. §§725.503(b), 727.302(c)(1); *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989). The onset date is not established by the first medical evidence of record indicating total disability or by medical evidence sufficient to invoke the interim presumption at 20 C.F.R. §727.203(a) (2000). Rather, such evidence indicates only that the miner became totally disabled at some time prior to the date of such medical evidence. *Henning v. Peabody Coal Co.*, 7 BLR 1-753 (1985)(qualifying pulmonary function studies do not establish onset of total disability.) In the instant case, the administrative law judge erroneously based her designation of April 1, 1981 as the date upon which benefits commence, on the April 21, 1981 pulmonary function study upon which she relied, in part, to invoke the interim presumption. As the administrative law judge did not consider all the relevant evidence in determining the appropriate date from which benefits commence, the administrative law judge, on remand, must reconsider the date benefits commence.

**Transfer of Liability**

Employer contends that the transfer of any liability for the payment of benefits to the Trust Fund is warranted because "this claim has dragged on far too long, with too many inconsistent decisions, too much likelihood that advanced age rather than coal-mine employment is the real cause of [claimant's] medical problems, and too much incentive for a sympathy award of benefits after nearly three decades of litigation, for employer to receive a fair hearing or mount a meaningful defense." Employer's Brief at 28. The Director urges the Board to reject employer's argument.

Employer's contention lacks merit. Due process requires that a liable coal mine operator be afforded notice of the claim and the opportunity to mount a meaningful defense. *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). We hold that employer has not been denied due process in that it was timely notified of the claim, and employer developed evidence and participated in each phase of the adjudication. Further, employer has shown no prejudice based on the proceedings' duration. *Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 BLR 2-95 (6th Cir. 1989); *Director, OWCP v. Oglebay Norton Co.* [*Goddard*], 877 F.2d 1300, 12 BLR 2-357 (6th Cir. 1989). Moreover, employer has contributed to the proceedings' duration by electing to appeal from unfavorable rulings. Further, employer merely speculates that the passage of time increases the likelihood that claimant's age is the actual cause of his impairment and the incentive for a sympathy award rather than a fair adjudication of the merits of the claim. These speculations cannot serve as the basis for releasing employer from any potential liability in this case.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge