BRB No. 98-0786 BLA

ROY JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OLD BEN COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED: 7/14/99
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Establishing Date of Onset of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

Terri L. Bowman (Arter & Hadden), Washington, D.C., for employer.

Richard A. Seid (Henry L. Solano, 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, the United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand Establishing Date Of Onset (81-BLA-9504) of Administrative Law Judge Thomas M. Burke on a claim for medical benefits only 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). Initially, in a Decision and Order issued on June 11, 1984, Administrative Law Judge Robert J. Brissenden found that claimant[1] had established twenty-six years of coal mine employment and considered the claim pursuant to 20 C.F.R. Part 727. Judge Brissenden found that claimant failed to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a). Judge Brissenden also found that claimant failed to establish entitlement pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied. On appeal, the Board vacated the award of benefits and held that under the newly issued holding of the United States Court of Appeals for the Fourth Circuit in *Stapleton v. Westmoreland Coal Co.,* 785 F.2d 424, 8 BLR 2-109 (4th Cir. 1986), claimant had established invocation of the interim presumption pursuant to Section 727.203(a)(1) as a matter of law by submitting at least one x-ray reading diagnosing the presence of pneumoconiosis. The Board therefore remanded the case for consideration of whether the evidence of record established rebuttal under Section 727.203(b). *Johnson v. Old Ben Coal Co.,* BRB No. 84-1594 BLA (July 15, 1986)(unpub).

Judge Brissenden issued a Decision and Order on Remand on December 18, 1986, finding that claimant established invocation of the interim presumption pursuant to Section 727.203(a)(1) and (a)(3). Judge Brissenden also found that employer established rebuttal of the interim presumption pursuant to Section 727.203(b)(2) based on the non-qualifying pulmonary function studies of record. Judge Brissenden also found that entitlement was precluded under Part 410, Subpart D. Accordingly, benefits were again denied. On appeal, the Board affirmed the finding of invocation of the interim presumption as unchallenged on appeal, and reversed Judge Brissenden's finding of rebuttal of the interim presumption at Section 727.203(b)(2) as a matter of law. The Board then remanded the case for consideration of rebuttal under Section 727.203(b)(3). The Board also noted that a finding of invocation of the interim presumption at Section 727.203(a)(1) precluded a

[1]Claimant is the miner, Roy Johnson, who filed this Part C application for medical benefits only on October 24, 1978. Director's Exhibit 1. Claimant also filed a Part B application for benefits with the Social Security Administration in 1970 and was awarded benefits on this claim in a Decision and Order dated November 6, 1975. Director's Exhibit 10.

finding of rebuttal pursuant to Section 727.203(b)(4). *Johnson v. Old Ben Coal Co.,* BRB No. 87- 0217 BLA (Aug. 29, 1988)(unpub.).

In a Decision and Order on Remand issued on December 22, 1988, Judge Brissenden found that employer had failed to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3), and benefits were awarded. On appeal, the Board vacated the finding that rebuttal was not established pursuant to Section 727.203(b)(3), and remanded the case for reconsideration of the evidence relevant to this issue.[2] *Johnson v. Old Ben Coal Co.,* 17 BLR 1-5 (1992).

[2]The Board agreed with employer's contention that the administrative law judge erred by relying on *Bethlehem Mines Corp. v. Massey,* 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), to discredit the reports of Drs. O'Neill, Renn and Castle on the ground that those physicians are non-examining physicians who addressed matters which Dr. Buddington, the examining physician, did not address. The Board held that inasmuch as Dr. Buddington recorded a twenty pack year smoking history for claimant and as the examining physicians reviewed Dr. Buddington's report when arriving at their own conclusion, the reviewing physicians based their respective opinions on matters sufficiently addressed by the examining physician. Thus, the Board held that the administrative law judge erred in rejecting those reports under 20 C.F.R. §727.203(b)(3) merely because the physicians did not personally examine the miner. *Johnson v. Old Ben Coal Co.,* 17 BLR 1-5 (1992).

On remand, the case was transferred to Administrative Law Judge Thomas J. Burke (the administrative law judge) who issued a Decision and Order on Remand Denying Benefits on September 13, 1993. The administrative law judge found that employer established rebuttal of the interim presumption at Section 727.203(b)(3), and denied benefits. On appeal, the Board held that rebuttal under Section 727.203(b)(3) was precluded as a matter of law based on the holding in *Malcomb v. Island Creek Coal Co.,* 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994). Accordingly, the Board reversed the administrative law judge's denial of benefits. The Board remanded the case to the administrative law judge to determine the date of commencement of benefits. *Johnson v. Old Ben Coal Co.,* 19 BLR 1-103 (1995). In response to employer's motion for reconsideration, the Board held that employer waived its right to contest the finding of invocation of the interim presumption as inconsistent with the holding in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP,* 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied,* 484 U.S. 1047 (1988), since employer raised this issue for the first time eight years after the issuance of *Mullins*.[3] Thus, the Board held that this issue was not raised in a timely manner. The Board also reaffirmed its holding that rebuttal was unavailable at Section 727.203(b)(3), and held that remand to allow employer to supplement the record on this issue was unnecessary since the holding in *Malcomb* did not constitute a change in law requiring remand, but merely clarified the rebuttal standard previously expressed by 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). *Johnson v. Old Ben Coal Co.,* BRB No. 94-0164 BLA (Sept. 11, 1997)(unpub.); *see Malcomb, supra.*

On February 12, 1998, the administrative law judge issued his Decision and Order on Remand Establishing Date Of Onset. Applying 20 C.F.R. §725.503, the administrative law judge found that the evidence of record failed to establish the precise date that claimant became totally disabled and awarded benefits as of October, 1978, the month in which claimant filed for medical benefits only.

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[3]The Board stated that it was undisputed that employer had failed to contest the issue of invocation under 20 C.F.R. §727.203(a) until filing its motion for reconsideration. The Board further noted that since 1987, when the decision in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP,* 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied,* 484 U.S. 1047 (1988), was issued, the Board had reviewed and remanded this case four times. *Johnson v. Old Ben Coal Co.,* BRB No. 94-0164 BLA (Sept. 11, 1997)(unpub.). In *Mullins,* the United States Supreme Court overruled the holding in *Stapleton v. Westmoreland Coal Co.,* 785 F.2d 424, 8 BLR 2-109 (4th Cir. 1986), and held that all like-kind evidence is to be weighed prior to determining whether invocation of the interim presumption has been established under Section 727.203(a)(1)-(4).

On appeal, employer argues that the administrative law judge erred in awarding benefits as of October 1978, and also asserts that remand is required for the administrative law judge to reconsider the issues of invocation and rebuttal of the interim presumption. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that the law of the case doctrine precludes review of employer's previously raised invocation and rebuttal arguments, and further states that remand to allow employer to supplement the record regarding the issue of rebuttal pursuant to Section 727.203(b)(3) is unnecessary since no change in law has occurred. The Director has not otherwise addressed the merits of this appeal. Claimant responds that substantial evidence supports the administrative law judge's finding regarding the date of commencement of benefits and joins the Director in contending that the law of the case doctrine precludes consideration of employer's invocation and rebuttal arguments.

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 applicable 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).

Employer presently argues that remand is required to allow it to respond to changes of law.[4] In challenging the administrative law judge's finding of invocation of the interim presumption based on the holding in *Stapleton* and the Board's holding that rebuttal of the interim presumption at Section 727.203(b)(3) is precluded as a matter of law under *Malcomb,* employer contends that changes in law require remand of these issues. Specifically, employer argues that if the administrative law judge had weighed the evidence of record prior to finding invocation established as required by the holding in *Mullins,* claimant would not have established invocation of the interim presumption, and that under the holding of the United States Court of Appeals for the Seventh Circuit in *Old Ben Coal Co. v. Director, OWCP,* [*Mitchell*], 62 F.3d 1003, (7th Cir. 1993), employer has not waived its right to raise the issue of a change in law.[5] Employer argues that failure to apply *Mullins* would result in a

[4]Employer states that it "maintains its objection raised on reconsideration and on the merits so that the Board will reconsider or, in the alternative, to preserve employer's disagreement in the event a further appeal is necessary." Employer's Brief at 14-15.

[5]In *Old Ben Coal Co. v. Director, OWCP, [Mitchell],* 62 F.3d 1003 (7th Cir. 1995),

manifest injustice. Employer also contends that the holding in *Malcomb* constitutes a change in law so that the Board is required to reconsider its affirmance of the administrative law judge's finding that rebuttal cannot be established pursuant to Section 727.203(b)(3) and that therefore, remand is required to allow employer to supplement the record on this issue.[6] We find no merit in employer's arguments, all of which were considered and rejected by the Board in our 1997 Decision and Order

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the United States Court of Appeals for the Seventh Circuit held that where the United States Supreme Court decides a relevant case while litigation is pending, the employer's omission of an argument based upon that decision does not amount to a waiver. However, the court also held that a party could not fail to make good faith arguments, and then because of developments in the law, raise a completely new challenge, as employer herein has done by failing to raise this issue until eight years after the issuance of *Mullins.*

[6]In *Bethlehem Mines Corp. v. Massey,* 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1994), the United States Court of Appeals for the Fourth Circuit held that a non-examining physician's opinion on matters not addressed by the examining physicians is insufficient, as a matter of law, to rebut the interim presumption under 20 C.F.R. §727.203(b). In *Massey,* the non-examining physician, who attributed the miner's totally disabling emphysema to smoking, relied exclusively on the medical reports prepared by other physicians, none of whom addressed the possibility that smoking caused the miner's disabling condition. The court reiterated this rationale in *Malcomb v. Island Creek Coal Co.,* 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994). In *Malcomb,* the court held that the fact-finder erred at Section 727.203(b)(3) rebuttal in relying upon a non-examining physician's opinion attributing the miner's disability to alcoholism, because none of the examining physicians diagnosed alcoholism or addressed whether such condition played a role in the miner's total disability.

In the instant case, the non-examining physicians reviewed an examining physician's notation of a twenty pack year smoking history when arriving at their conclusions that the miner's respiratory impairment was due to his smoking. In its 1995 Decision and Order, the Board agreed with the position of the Director, that the *Malcomb* decision, issued subsequent to the Board's 1992 decision, provided additional guidance concerning the proper application of *Massey,* and that the Board should therefore revisit that issue. The Board held that because the opinions of the non-examining physicians went beyond the matters sufficiently addressed by Dr. Buddington, the examining physician, who did not specifically discuss smoking as a cause of claimant's disability, the opinions of the non-examining physicians were insufficient, as a matter of law, to establish rebuttal pursuant to Section 727.203(b)(3) within the law of the United States Court of Appeals for the Fourth Circuit. *Johnson v. Old Ben Coal Co.,* 19 BLR 1-103 (1995).

on Reconsideration.

In applying the doctrine of law of the case, the Board has held that it will adhere to its initial decision unless there has been a change in the underlying factual situation; intervening controlling authority demonstrates that the initial decision was erroneous; or the first decision was clearly erroneous and to let it stand would produce a manifest injustice. *See Brinkley v. Peabody Coal Co.,* 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield,* 22 BRBS 224 (1984). As employer has not shown that an exception to the law of the case doctrine is applicable herein, we decline to disturb our prior holding.[7] *See Gillen v. Peabody Coal Co.,* 16 BLR 1-22 (1991); *Bridges v. Director, OWCP,* 6 BLR 1-988 (1984).

Employer also argues that the administrative law judge erred by awarding benefits as of the month claimant filed for benefits, contending that the administrative law judge inconsistently weighed the medical evidence of record. Applying 20 C.F.R. §725.503, the administrative law judge found that while it was evident that claimant became totally disabled due to coal workers' pneumoconiosis at some point prior to, or during, the years of 1980 through 1983, there was insufficient medical evidence of record to render a specific finding on this issue. The administrative law judge concluded that because the date of onset of total disability due to pneumoconiosis could not be ascertained from the medical evidence, benefits were payable from October of 1978, the month in which the miner's claim was filed. 20 C.F.R. §725.503; Decision and Order at 2.

[7]We also reject employer's contention that the Director lacks standing to participate in this appeal. The Director, as a party-in-interest, always has standing to safeguard the proper administration of the Black Lung Act. *See generally Director v. Newport News Shipbuilding and Dry Dock Co.* [*Harcum*], 514 U.S. 122, 29 BRBS 87 (1995); *See Reed v. Director, OWCP,* 10 BLR 1-67 (1987). Moreover, employer erroneously asserts that claimant has not participated in the present appeal.

It is undisputed that the instant case involves a Part C claim for medical benefits only (MBO).[8] Thus, 20 C.F.R. §725.701A, rather then Section 725.503, establishes the date for the commencement of payment of the medical benefits. Section 725.701A(h) provides that a miner who is determined eligible for medical benefits is entitled to medical benefits from the date of filing of his MBO claim. Section 725.701A(h) also provides that the medical benefits may also include payments for any unreimbursed medical treatment costs incurred personally by such miner during the period from January 1, 1974 to the date of filing, which are attributable to medical care required as a result of the miner's total disability due to pneumoconiosis. *Id.* Claimant is therefore entitled to receive medical benefits, payable by the responsible operator, from October, 1978, the date of filing of his MBO claim. 20 C.F.R. §725.701A(f), (h). Claimant may also seek payment for

[8]Under the 1977 Amendments, miners awarded Part B benefits were extended an opportunity to file for medical benefits only (MBO) under Part C pursuant to Section 11 of those Amendments codified at 30 U.S.C. §924(a). As noted *supra*, claimant filed his Part B claim for black lung benefits in 1970. After receiving interim benefits, claimant was awarded benefits in 1975. Claimant then filed his Part C claim for MBO in October, 1978. At the time, the district director determined that claimant was eligible for MBO from the date he filed his MBO claim and that claimant could also be paid for any unreimbursed medical benefits from January 1, 1974 to the date he filed his MBO claim. Employer contested the district director's MBO award. At the hearing before Judge Brissenden, the parties agreed that claimant was seeking MBO and that his previous award of black lung benefits was not at issue.

unreimbursed medical costs incurred by him due to medical treatment as a result of total disability due to pneumoconiosis from January 1, 1974 to October, 1978.[9] *Id*.

[9]Section 725.701A(h) provides that if a miner seeks reimbursement for medical care costs personally incurred before the filing of his MBO claim, the district director shall require documented proof of the nature of the medical service provided, the identity of the medical provider, the cost of the service, and fact that the cost was paid by the miner. 20 C.F.R. §725.701A(h).

Accordingly, the Decision and Order on Remand Establishing Date Of Onset of the administrative law judge is affirmed in part and modified in part.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge