BRB Nos. 98-1346 BLA
and 98-1346 BLA-A

LAWRENCE C. McMAHON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
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 - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Diana H. Crutchfield (Berry, Kessler, Crutchfield & Taylor), Moundsville, West Virginia, for claimant.

Kathy L. Snyder (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (97-BLA-1148) of Administrative Law Judge Michael P. Lesniak 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 has a lengthy procedural history. In his initial Decision and Order issued on August 19, 1986, Administrative Law Judge Thomas M. Burke credited claimant with at least 28.75 years of qualifying coal mine employment, and adjudicated this claim, filed on August 20, 1979, pursuant to the provisions at 20 C.F.R. Part

727. Judge Burke found that the x-ray evidence of record established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) based on application of the "true doubt rule," but found rebuttal thereof established pursuant to 20 C.F.R. §727.203(b)(2), and further found entitlement precluded under 20 C.F.R. Parts 410 and 718. Accordingly, benefits were denied. Director's Exhibit 22.

On appeal, the Board affirmed Judge Burke's finding that entitlement was precluded pursuant to 20 C.F.R. Part 410, Subpart D, and held that 20 C.F.R. §410.490 was inapplicable. The Board vacated Judge Burke's finding of rebuttal at Section 727.203(b)(2), however, and remanded this case for further consideration of the evidence relevant to rebuttal at Section 727.203(b)(2), (3), consistent with *York v. Benefits Review Board*, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987); *Warman v. Pittsburg & Midway Coal Mining 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)(table). *McMahon v. Consolidation Coal Co.*, BRB No. 86-2461 BLA (June 22, 1988)(unpublished); Director's Exhibit 23.

In a Decision and Order on Remand issued on April 27, 1989, Judge Burke found the evidence of record insufficient to establish rebuttal pursuant to Section 727.203(b)(2), (3), and consequently awarded benefits. Director's Exhibit 24.

On the second appeal, the Board affirmed Judge Burke's award of benefits, rejecting employer's arguments with respect to Dr. Renn's opinion, and holding that application of the rebuttal standards of *York*, *supra*, and *Warman*, *supra*, was not unfair to employer in light of the presence of evidence in the record which, if credited, could establish rebuttal at Section 727.203(b)(2) and (3), as well as employer's failure to request that the record be reopened for the submission of additional evidence on remand. *McMahon v. Consolidation Coal Co.*, BRB No. 89-1790 BLA (Aug. 17, 1992)(unpublished); Director's Exhibit 25. In a Decision and Order on Reconsideration issued on November 14, 1994, the Board denied the relief requested by employer inasmuch as intervening case law provided further support for Judge Burke's decision. Director's Exhibit 26.

On appeal to the United States Court of Appeals for the Sixth Circuit, the Court concluded that in light of intervening case law, Judge Burke's application of the "true doubt rule" to find invocation established at Section 727.203(a)(1) was not in accordance with the applicable law, and that employer did not waive its right to raise this issue by virtue of its failure to raise it before the Board. Inasmuch as Judge Burke's finding that the evidence was insufficient to establish invocation of the interim presumption at Section 727.203(a)(2)-(4) remained unchallenged, the Court remanded this case to the Board with instructions to reverse Judge Burke's award of benefits under 20 C.F.R. Part 727, to deny benefits under Part 727, and to remand the case to an administrative law judge for further consideration under the regulations at 20 C.F.R. Part 718, with the suggestion that the administrative law

judge be permitted to reopen the record for the submission of evidence concerning claimant's current medical condition. *Consolidation Coal Co. v. McMahon,* No. 95-3005 (6th Cir. March 11, 1996); Director's Exhibit 27.

Following development of new evidence before the district director, this case was assigned to Administrative Law Judge Michael P. Lesniak for hearing on November 14, 1997. In his Decision and Order on Remand issued on June 24, 1998, the administrative law judge accepted employer's concession that claimant had pneumoconiosis arising out of coal mine employment, but found that the weight of the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

In the present appeal, claimant contends that the administrative law judge erred in denying claimant's motion to strike Dr. Altmeyer's reports dated December 10, 1996 and January 26, 1998, and the objective evidence in support thereof, from the record. Employer responds, urging affirmance of the denial of benefits and arguing that the administrative law judge's denial of the motion to strike Dr. Altmeyer's reports from the record was proper. Employer has also filed a cross-appeal, contending that the administrative law judge erred in striking Dr. Kleinerman's deposition testimony and medical reports from the record. Claimant responds, arguing that the excision of this evidence was proper. The Director, Office of Workers' Compensation Programs (the Director), has not participated in 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant maintains that Dr. Altmeyer's refusal to testify and be cross-examined at his deposition scheduled by employer for August 1, 1997, and at the hearing on November 14, 1997, deprived claimant of the opportunity to delve into the physician's theories and conclusions, both general and specific to this case, thereby substantially prejudicing claimant's right to due process. Claimant thus asserts that Dr. Altmeyer's medical findings and reports must be stricken from the record. Claimant's arguments are without merit. A review of the record reveals that claimant was not denied the opportunity to ascertain the bases for Dr. Altmeyer's conclusions; rather, claimant's counsel failed to exercise any of the options available to her for eliciting the desired information from Dr. Altmeyer, including but not limited to the propounding of interrogatories by claimant to Dr. Altmeyer; the noticing and taking of Dr. Altmeyer's deposition by claimant; the issuance of a subpoena for Dr. Altmeyer to testify at the hearing; or counsel's simply allowing Dr. Altmeyer to testify, either

at the deposition scheduled by employer or at the hearing as employer's expert witness, without suggesting that it would be illegal, immoral, unethical, and/or against claimant's wishes for the physician to do so.[1] *See* Order on Claimant's Motions, issued April 3, 1998, at 2-3; Hearing Transcript at 38-68; Employer's Exhibit 9; *see generally Richardson v. Perales*, 402 U.S. 389 (1971). Inasmuch as claimant provided no valid ground for the exclusion of Dr. Altmeyer's reports from the record, and as claimant has not otherwise challenged the administrative law judge's findings on the merits, we affirm the administrative law judge's findings pursuant to Section 718.204(c) and his finding that claimant is not entitled to benefits pursuant to 20 C.F.R. Part 718. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, we need not address employer's arguments on cross-appeal.

[1] Employer additionally notes that claimant did not object to the introduction into evidence of Dr. Altmeyer's reports at the hearing, and accurately maintains that there is no evidentiary rule or regulation requiring an employer to take the testimony of its own expert.

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge