BRB No. 99-0208 BLA

CARL C. THORN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ITMANN COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (84-BLA-8200) of Administrative Law Judge Clement J. Kichuk (the administrative law judge) 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. In the original Decision and Order, Administrative Law Judge Sheldon R. Lipson found that claimant failed to establish the existence of complicated pneumoconiosis, and thus, he found that claimant failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §410.418. Further, Judge Lipson

credited claimant with twenty years of coal mine employment, and found the evidence sufficient to establish invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1). Although Judge Lipson found the evidence insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(1), (b)(2) and (b)(4), he found the evidence sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3). Hence, Judge Lipson found that claimant was not entitled to benefits under 20 C.F.R. Part 727. In addition, Judge Lipson found that claimant was not entitled to benefits under 20 C.F.R. §410.490. Accordingly, Judge Lipson denied benefits.

In response to claimant's appeal, the Board affirmed Judge Lipson's finding that claimant failed to establish the existence of complicated pneumoconiosis. The Board also affirmed Judge Lipson's findings at 20 C.F.R. §§727.203(a)(1) and 727.203(b)(1)-(4). Lastly, the Board, citing *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 15 BLR 2-155 (1991), and *Whiteman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991)(*en banc*), noted that 20 C.F.R. §410.490 is not applicable to this case and vacated Judge Lipson's finding thereunder. *Thorn v. Itmann Coal Co.*, BRB No. 89-1474 BLA (Apr. 10, 1992)(unpub.). On appeal by claimant, the United States Court of Appeals for the Fourth Circuit vacated Judge Lipson's finding that the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) and remanded the case for further consideration.[1] *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993).

On the first remand, Judge Lipson denied employer's Motion to Reopen the Record. Judge Lipson also found the evidence insufficient to establish rebuttal of the interim presumption of total disability due to pneumoconiosis at 20 C.F.R.

[1]Based on the decision of the United States Court of Appeals for the Fourth Circuit in *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993), the Board issued an Order, remanding the case to Administrative Law Judge Sheldon R. Lipson for further consideration of the evidence pursuant to 20 C.F.R. §727.203(b)(3). *Thorn v. Itmann Coal Co.*, BRB No. 89-1474 BLA (Order)(June 9, 1994)(unpub.).

§727.203(b)(3). Accordingly, Judge Lipson awarded benefits. Subsequently, Judge Lipson denied employer's request for reconsideration. In disposing of employer's appeal, the Board held that Judge Lipson's denial of employer's Motion to Reopen the Record constituted an abuse of discretion and resulted in manifest injustice to employer. Hence, the Board reversed Judge Lipson's denial of employer's motion and remanded the case. The Board instructed Judge Lipson that, on remand, he must reopen the record to permit the submission of evidence relevant to the holdings of the Fourth Circuit in *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993), and *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). *Thorn v. Itmann Coal Co.*, BRB No. 96-1716 BLA (Sept. 24, 1997)(unpub.).

On the most recent remand, the case was assigned to the administrative law judge, who found the evidence sufficient to establish rebuttal of the interim presumption of total disability due to pneumoconiosis at 20 C.F.R. §727.203(b)(3). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the Board erred in reopening the record on remand. Claimant also contends that the administrative law judge erred in finding the evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). Employer responds, urging affirmance of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has declined to participate 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 into the Act 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 Board erred in reversing the administrative law judge's decision not to reopen the record on remand to allow employer to generate new evidence. Specifically, claimant asserts that the Fourth Circuit's decision in *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993), did not change its standard for establishing rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) but simply addressed the weaknesses in the evidence previously relied upon by employer to establish rebuttal thereunder. We disagree with claimant's position that the Board's prior decision was in error. In its prior decision, the Board observed that "[i]n declining to grant employer's Motion to Reopen the Record, [Judge Lipson] suggested that no injustice would result to employer inasmuch as:

> [T]he employer's physicians have opined that claimant has no pulmonary impairment whatever. If credited, this would demonstrate that the claimant's pneumoconiosis does not contribute at all to any disability from which the claimant might suffer, thus satisfying the new rebuttal standard.

Decision and Order on Remand at 2, n.2." *Thorn v. Itmann Coal Co.*, BRB No. 96-1716 BLA, slip op. at 3 (Sept. 24, 1997)(unpub.). The Board held that Judge Lipson's "determination that the evidence previously submitted by employer accords with the language in *Thorn* and *Grigg* is not correct in light of the fact that the Fourth Circuit explicitly held in *Thorn* that the opinions of Drs. Kress and Renn were not probative of rebuttal under Section 727.203(b)(3) because Dr. Renn considered only claimant's respiratory system and Dr. Kress focused on whether claimant was disabled from a respiratory standpoint." *Id*. The Board also held that "[i]n addition, Drs. Craft and Piracha, the physicians whose opinions [Judge Lipson] weighed on remand, did not state their conclusions in the unequivocal terms required by the Fourth Circuit." *Id*., slip op. at 3-4. Hence, the Board concluded that "inasmuch as [Judge Lipson] did not accurately characterize the extent to which employer's evidence corresponds to the evidentiary requirements set forth in *Thorn* and *Grigg*, [Judge Lipson] erred in denying employer's Motion to Reopen the Record." *Id*. at 4. The Board, therefore, reversed Judge Lipson's denial of employer's Motion to Reopen the Record and instructed Judge Lipson to reopen the record on remand to permit the submission of evidence relevant to the holdings of the Fourth Circuit in *Thorn* and *Grigg*.

In his decision, the administrative law judge observed that in response to the Board's reversal of Judge Lipson's denial of employer's Motion to Reopen the Record, "Employer submitted Dr. Castle's report and deposition."[2] Decision and

[2]In an Order dated April 22, 1998, Administrative Law Judge Thomas M. Burke granted employer's Motion to Hold the Record Open for ninety days for submission of additional evidence. Judge Burke admitted Dr. Castle's report and approved employer's request to take and admit Dr. Castle's deposition. Further, Judge Burke stated that employer may submit supplemental written reports only from Drs. Craft and Piracha. In his decision, Administrative Law Judge Clement J. Kichuk (the administrative law judge) observed that "Employer also submitted reports of Drs. Chillag, Zaldivar and Renn." Decision and Order on Remand at 19. Further, the administrative law judge observed that "[n]o supplemental written reports from Drs. Craft or Piracha were filed." *Id*. Hence, the administrative law judge found that "[a]s Judge Burke's April 22, 1998 Order restricted the scope of submissions to reports from Drs. Castle, Craft and Piracha, and to Dr. Castle's

Order on Remand at 19. In a report dated March 13, 1998, Dr. Castle opined that claimant is not totally disabled as a result of coal workers' pneumoconiosis or as a result of any other pulmonary process whether it has arisen from his coal mining employment or not. Employer's Exhibit on Remand 6. In a subsequent deposition dated May 15, 1998, Dr. Castle opined that claimant's coal workers' pneumoconiosis has caused him no impairment whatsoever. Employer's Exhibit on Remand 10 (Dr. Castle's Deposition at 34). Relevant case law supports the proposition that due process and fundamental fairness mandate a reopening of the record where a significant alteration in the type of evidence necessary to meet a party's burden of proof results from an altered legal standard. *See Peabody Coal Co. v. Ferguson,*140 F.3d 634, 21 BLR 2-344 (6th Cir. 1998); *Peabody Coal Co. v. White*, 135 F.3d 416, 21 BLR 2-247 (6th Cir. 1998); *Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *see also Bethenergy Mines, Inc. v. Director, OWCP* [*Vrobel*], 39 F.3d 458, 19 BLR 2-95 (3d Cir. 1994); *Marx v. Director, OWCP*, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989); *cf. Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F3d 491, 22 BLR 2-1 (4th Cir. 1999); *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999).[3] Although the Fourth Circuit emphasized in *Grigg*

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deposition, the reports of Drs. Chillag, Renn and Zaldivar will not be considered." *Id*.

[3]In *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999), the Board rejected employer's assertion that the administrative law judge's refusal to reopen the record in order to permit it to supplement the record in light of *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), constituted an abuse of discretion inasmuch as *Swarrow* imposes an increased burden on claimant, not employer, to prove a material change in conditions. Although the law changed with regard to 20 C.F.R. §725.309, the Board held that the change in the law did not increase employer's evidentiary burden or the type of evidence relevant to 20 C.F.R. §725.309. Hence, the Board concluded that due process and fundamental fairness

that the rule out standard enunciated in *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), continues to be the law, the Fourth Circuit's decisions in *Thorn* and *Grigg* have altered the approach of the parties with respect to the type of evidence that is necessary to satisfy the parties' burden of proof under the "rule out" standard. Thus, inasmuch as the administrative law judge properly followed the Board's instruction to reopen the record on remand to permit employer to submit evidence relevant to the holdings of the Fourth Circuit in *Thorn* and *Grigg*, we are not persuaded that there is reason for us to revisit this issue. *See generally Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Lenig v. Director, OWCP*, 9 BLR 1-147 (1986).

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did not mandate a reopening of the record.

Next, claimant contends that the administrative law judge erred in finding the evidence sufficient to establish rebuttal of the interim presumption at 727.203(b)(3). We disagree. In *Massey*, the Fourth Circuit held that the party opposing entitlement must rule out the causal relationship between the miner's total disability and his coal mine employment in order to establish rebuttal of the interim presumption under 20 C.F.R. §727.203(b)(3). Claimant asserts that the administrative law judge erred by relying on Dr. Castle's opinion to rule out coal dust exposure as an aggravating factor of his disability. The administrative law judge properly accorded greater weight to the opinion of Dr. Castle because of his superior qualifications.[4] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

[4]The administrative law judge stated that "[o]f all the physician's (sic) whose opinions are now under consideration, only Dr. Castle is both a [B]oard certified internist and pulmonologists, as well as a B reader." Decision and Order on Remand at 23.

In addition, the administrative law judge properly accorded greater weight to the opinion of Dr. Castle than to the contrary opinions of record because Dr. Castle "provided the most well-reasoned and documented opinion in the record." Decision and Order on Remand at 24; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge observed that "Dr. Castle not only examined Claimant in January 1998, but he reviewed an extensive amount of the medical evidence in the case." Decision and Order on Remand at 23. The administrative law judge stated, "[i]t is particularly worthy of note that Dr. Castle is the only physician whose opinion is based on valid pulmonary function studies." *Id*. Hence, the administrative law judge concluded that "Dr. Castle's finding of no totally disabling respiratory impairment from any cause is supported by the objective test data." *Id*. Thus, we reject claimant's assertion that Dr. Castle's opinion is not well reasoned.[5] Moreover, since Dr. Castle opined that claimant is not totally disabled as a result of coal workers' pneumoconiosis or as a result of any other pulmonary

[5]Claimant, citing *Greer v. Director, OWCP*, 940 F.2d 88, 15 BLR 2-167 (4th Cir. 1991), asserts that the administrative law judge erred in according greater weight to the opinion of Dr. Castle since it was based on Dr. Castle's reliance on the highest results of a pulmonary function study. In *Greer*, the Fourth Circuit rejected the proposition that an administrative law judge, in weighing conflicting pulmonary function studies under 20 C.F.R. §718.204(c)(1), may find that higher test results are more reliable than lower ones. The facts in the instant case are distinguishable from the facts in *Greer*. In the present case, the administrative law judge did not rely on the highest results in a pulmonary function study as a basis for weighing conflicting pulmonary function study evidence. To the contrary, the administrative law judge weighed the conflicting medical opinion evidence under 20 C.F.R. §727.203(b)(3) and properly accorded greater weight to the opinion of Dr. Castle because he found it to be better reasoned and documented. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). While Dr. Castle may have chosen the highest pulmonary function test results, the administrative law judge did not base his weighing of the conflicting evidence on this factor. Thus, we reject claimant's assertion that the administrative law judge erred in according greater weight to the opinion of Dr. Castle since it is not in accordance with *Greer*. The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

process whether it has arisen from his coal mining employment or not, we reject claimant's assertion that Dr. Castle's opinion is not sufficient to rule out coal dust exposure as an aggravating factor in his disability. *See Grigg, supra*; *Massey*, *supra*; *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish rebuttal of the interim presumption of total disability due to pneumoconiosis at 20 C.F.R. §727.203(b)(3). We, thus, also affirm the administrative law judge's denial of benefits.

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

JAMES F. BROWN
Administrative Appeals Judge