BRB No. 00-0801 BLA

EUGENE W. HAMBLIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	DATE ISSUED:
Employer-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 of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Mark Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (Judith E. Kramer, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (97-BLA-0043) of

Administrative Law Judge Pamela Lakes Wood awarding 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).[1] Claimant filed a claim for benefits on February 4, 1980. In a Decision and Order dated May 21, 1990, Administrative Law Judge Charles W. Campbell, after noting that employer had conceded that claimant had forty-two years of coal mine employment, found that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), (a)(2) and (a)(4). Citing *Taylor v. Clinchfield Coal Co.*, 895 F.2d 178, 13 BLR 2-294 (4th Cir. 1990), Judge Campbell found that the rebuttal provisions set out at 20 C.F.R. §410.490(c) were applicable. Judge Campbell found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §410.490(c). Accordingly, Judge Campbell awarded benefits.

By Decision and Order dated March 12, 1993, the Board noted that inasmuch as employer conceded that the evidence was sufficient to establish invocation pursuant to 20 C.F.R. §727.203(a)(2), Judge Campbell's error, if any, in finding that the medical evidence was sufficient to establish invocation pursuant to 20 C.F.R. §727.203(a)(4) was harmless. *Hamblin v. Eastern Associated Coal Corp.*, BRB No. 90-1702 BLA (Mar. 12, 1993) (unpublished). After affirming Judge Campbell's findings pursuant to 20 C.F.R. §410.490(c)(1) and (c)(2) as unchallenged on appeal, the Board noted that these findings were equivalent to findings that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1) and (b)(2). *Id.* The Board, however, noted that subsequent to Judge Campbell's Decision and Order, the United States Supreme Court had reversed *Taylor* and held that the rebuttal methods set forth in Section 727.203(b)(3) and (b)(4) were valid. *Id.* The Board, therefore, remanded the case to Judge Campbell for consideration of whether the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4). *Id.* The Board also vacated Judge Campbell's finding regarding the date of claimant's entitlement to benefits. *Id.*

On remand, Judge Campbell found that the evidence was sufficient to establish

[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 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), (a)(2) and (a)(4). Judge Campbell further found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1)-(4). Accordingly, Judge Campbell awarded benefits. By Decision and Order dated December 29, 1994, the Board vacated Judge Campbell's finding that the x-ray evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and remanded the case for further consideration. *Hamblin v. Eastern Associated Coal Corp.*, BRB No. 94-0429 BLA (Dec. 29, 1994) (unpublished). The Board instructed Judge Campbell that if he found the x-ray evidence insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), he must consider whether the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(4). *Id.* The Board, noting that its previous affirmance of Judge Campbell's finding of invocation under 20 C.F.R. §727.203(a)(2) constituted the law of the case, held that it was not necessary to address Judge Campbell's finding of invocation under 20 C.F.R. §727.203(a)(4). *Id.* The Board also vacated Judge Campbell's finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(3) and remanded the case for further consideration. *Id.*

Due to Judge Campbell's unavailability, Administrative Law Judge George A. Fath reconsidered the claim on remand. Although Judge Fath found that the x-ray evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), Judge Fath noted that the Board had affirmed Judge Campbell's finding that the evidence was sufficient to establish invocation pursuant to 20 C.F.R. §727.203(a)(2). Judge Fath, therefore, considered whether the evidence was sufficient to establish rebuttal of the presumption. Judge Fath found that the evidence was sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3). Judge Fath also found that the evidence was insufficient to establish entitlement under 20 C.F.R. Part 410, Subpart D and 20 C.F.R. Part 718. Accordingly, Judge Fath denied benefits.

Claimant subsequently requested modification of his denied claim. Administrative Law Judge Pamela Lakes Wood (the administrative law judge) found that the newly submitted evidence was sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge further found that there had been a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge, therefore, considered claimant's 1980 claim on the merits. Although the administrative law judge found that the evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), (a)(3) and (a)(4), the administrative law judge found that the pulmonary function study evidence was sufficient to establish invocation pursuant to 20 C.F.R. §727.203(a)(2). The administrative law judge further found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1)-(4). Accordingly, the administrative law judge awarded benefits.

By Decision and Order dated October 21, 1999, the Board affirmed the administrative law judge's finding that there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. *Hamblin v. Eastern Associated Coal Corp.*, BRB No. 99-0149 BLA (Oct. 21, 1999) (unpublished). The Board also affirmed the administrative law judge's findings pursuant to 20 C.F.R. §727.203(b)(1) and (b)(2). *Id.* The Board, however, vacated the administrative law judge's findings pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4) and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4). Accordingly, the administrative law judge awarded benefits. On appeal, employer challenges the administrative law judge's findings pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4). Employer also contends that liability in the instant case should be transferred to the Black Lung Disability Trust Fund (Trust Fund). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that liability in the instant case should not be transferred to the Trust Fund. In a reply brief, employer reiterates its previous contentions.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001) (order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which all parties have responded.[2] Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations.[3] Therefore, the Board will proceed to adjudicate the merits of this appeal.

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[2]Claimant, employer and the Director, Office of Workers' Compensation Programs, assert that the amended regulations do not affect the outcome of this case.

[3]The regulations contained in 20 C.F.R. Part 727 are not affected by the recent amendments to the regulations.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 contends that the administrative law judge committed numerous errors in finding the evidence insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3).[4] The administrative law judge, in her consideration of whether the evidence was sufficient to establish subsection (b)(3) rebuttal, credited Dr. Rasmussen's opinion, as supported by the epidemiological evidence, that both cigarette smoking and coal dust exposure contributed to claimant's total disability. Decision and Order on Remand at 2-5. The administrative law judge found that the medical evidence was insufficient to rule out pneumoconiosis or coal dust exposure as a cause of claimant's respiratory impairment. *Id.* The administrative law judge, therefore, found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). *Id.*

Employer initially contends that the administrative law judge failed to properly weigh the respective qualifications of Drs. Rasmussen, Fino and Tuteur.[5] The record reflects that Drs. Fino and Tuteur are Board-certified in Internal Medicine and Pulmonary Disease, Employer's Exhibits 6, 7, and that Dr. Rasmussen is Board-certified in Internal Medicine. Claimant's Exhibit 1. The administrative law judge noted that although Dr. Rasmussen is not Board-certified in the subspecialty of Pulmonary Disease, he nevertheless has an impressive background dealing with the lung diseases of coal miners. Decision and Order on Remand at 4. The administrative law judge noted that Dr. Rasmussen has acted as an occupational disease consultant and professor and has published articles on "related matters." *Id.* Given

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[4]The United States Court of Appeals for the Fourth Circuit has held that in order to establish rebuttal pursuant to subsection (b)(3), the party opposing entitlement must rule out any causal connection between a miner's disability and his coal mine employment. *See Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). A causal connection can be "ruled out" if positive evidence demonstrates that the miner suffers from no respiratory or pulmonary impairment of any kind or if such evidence explains all of any impairment present and attributes it solely to sources other than coal mine employment. *Lane Hollow Coal Co. v. Director, OWCP [Lockhart],* 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

[5]The Fourth Circuit has held that experts' respective qualifications are important indicators of the reliability of their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1998).

Dr. Rasmussen's background, we hold that the administrative law judge reasonably determined that Dr. Rasmussen was "as well qualified as Drs. Fino, Tuteur, and Zaldivar to express an opinion concerning the medical issues or the epidemiological evidence." *Id.*

Employer also argues that the administrative law judge erred in his consideration of the opinions of Drs. Fino and Tuteur regarding the reliability of the medical studies that Dr. Rasmussen relied upon to support his opinion. In his May 8, 1997 report, Dr. Rasmussen noted that a number of epidemiologic studies (longitudinal, cross sectional and mortality studies) confirm the fact that coal mine dust exposure is capable of producing chronic obstructive pulmonary disease. Claimant's Exhibit 1. Drs. Fino and Tuteur opined that these studies are invalid. *See* Employer's Exhibits 6, 10.

The administrative law judge properly discredited Dr. Tuteur's opinion regarding the reliability of the studies, finding that Dr. Tuteur's "conclusory discussion" was "neither well reasoned nor well founded."[6] *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 4. However, we agree with employer that the administrative law judge improperly substituted her opinion for that of Dr. Fino in regard to the validity of the articles relied upon by Dr. Rasmussen. *See Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986) (*en banc*); *see also Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); Decision and Order on Remand at 3-4. For example, the administrative law judge found that, on the issue of obstruction, the fact that the studies only found a limited degree of obstruction would not undermine Dr. Rasmussen's finding that coal mine dust had an effect on the obstruction. Decision and Order on Remand at 3 n.4. Dr. Fino, however, characterized the amount of the reduction in the FEV1 values found in the studies as "insignificant." Employer's Exhibit 10 at 16.

The administrative law judge also erred to the extent that he discredited Dr. Fino's opinion because he did not "suggest other valid studies reaching contrary findings." Decision and Order on Remand at 3 n.5. The fact that Dr. Fino did not

[6]The administrative law judge noted that Dr. Tuteur did not explain why a comparison between smoking and non-smoking miners and a comparison between non-smoking coal miners exposed to low levels of coal dust and non-smoking miners exposed to higher levels of coal dust was invalid. Decision and Order on Remand at 4 n.7. The administrative law judge also noted that Dr. Tuteur did not provide actual data supporting his conclusion concerning the alternate control group. *Id.* The administrative law judge further noted that while Dr. Tuteur indicated that the literature was "replete" with similar criticisms, he opted not to provide specific comments "in the spirit of brevity." Decision and Order on Remand at 4 n.8. The administrative law judge found that this type of discussion was unpersuasive. *Id.*

provide valid studies reaching contrary findings does not undermine his opinion that the articles relied upon by Dr. Rasmussen to support his conclusions were flawed.

We also agree with employer that the administrative law judge erred to the extent that he found that Drs. Fino and Tuteur assumed that there was no such thing as "legal pneumoconiosis."[7] *See* Decision and Order on Remand at 5. Neither Dr. Fino nor Dr. Tuteur assumed that there was no such thing as "legal" pneumoconiosis.[8] Employer's Exhibits 6, 7, 9, 10.

Employer next contends that the administrative law judge erred in discrediting the opinions of Drs. Fino and Tuteur because they did not examine claimant. The Fourth Circuit has held that an administrative law judge should not mechanistically credit, to the exclusion of all other evidence, the opinion of an examining or treating physician solely because the

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[7]The Act and its implementing regulations recognize both "clinical" and "legal" pneumoconiosis. *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-106 (1998). Legal pneumoconiosis, as defined in 20 C.F.R §727.202, is a broader category which is not dependent upon a determination of clinical pneumoconiosis, and the absence of clinical pneumoconiosis does not necessarily influence a physician's diagnosis of legal pneumoconiosis.

[8]In a report dated October 6, 1997, Dr. Fino opined that there was insufficient objective evidence to justify a diagnosis of simple coal workers' pneumoconiosis. Employer's Exhibit 7. Dr. Fino also opined that claimant did not suffer from an occupationally acquired pulmonary condition. *Id.* During his October 15, 1997 deposition, Dr. Fino specifically indicated that, even using the more expanded or "legal" definition of pneumoconiosis, it was his opinion that claimant did not suffer from the disease. *See* Employer's Exhibit 10 at 18-19.

In a report dated October 6, 1997, Dr. Tuteur opined that claimant's disability was due in part to a mild obstructive ventilatory defect caused by his cigarette smoke induced chronic bronchitis and emphysema. Employer's Exhibit 6. Dr. Tuteur opined that claimant's respiratory impairment was in no way related to, aggravated by, or caused by the inhalation of coal mine dust or the development of coal workers' pneumoconiosis. *Id.* During his October 20, 1997 deposition, Dr. Tuteur opined that neither the inhalation of dust nor the development of coal workers' pneumoconiosis contributed in any way to physiologic impairment of the lungs. Employer's Exhibit 9 at 16-17. Dr. Tuteur indicated that he did not believe that claimant suffered from pneumoconiosis. *Id.* However, even if claimant suffered from pneumoconiosis, Dr. Tuteur opined that the pneumoconiosis would not cause any clinical or physiologic impairment. *Id.*

doctor personally examined the claimant. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1998).

In her Decision and Order on Remand, the administrative law judge indicated that she had not used the failure of Drs. Fino and Tuteur to examine claimant as an "automatic basis" for discrediting their opinions and had never stated that they were not in as good a position to discuss the epidemiological evidence. Decision and Order on Remand at 4. The administrative law judge, however, further stated that:

> I continue to believe that [Drs. Fino and Tuteur] were at a disadvantage in determining the etiology of the Claimant's disability because they did not examine the Claimant, as a physician's opinion as to the etiology of a patient's condition would be dependent upon the specific circumstances presented by the patient (as revealed by the patient's history, clinical data, and medical examination) considered by the physician in the context of his expertise (which would, of course, include his familiarity with the epidemiological evidence.) While I have not changed my opinion on this issue, it was not, and is not, outcome determinative.

Decision and Order on Remand at 4.

On remand, should the administrative law judge elect to accord greater weight to Dr. Rasmussen's opinion based upon his status as an examining physician, she must explain how Rasmussen's examination provided him with an advantage over the reviewing physicians in expressing an opinion regarding the etiology of claimant's impairment. *See Hicks*, *supra*; *Akers*, *supra*.

Employer also requests the Board to reconsider its holding that Dr. Zaldivar's opinion is insufficient to support a finding of subsection (b)(3) rebuttal. In its October 21, 1999 Decision and Order, the Board held that the administrative law judge rationally found that Dr. Zaldivar's opinion that claimant had asthma and not pneumoconiosis, without identifying the etiology of the asthma, was not definite enough to rule out pneumoconiosis as a cause of disability. *Hamblin v. Eastern Associated Coal Corp.*, BRB No. 99-0149 BLA (Oct. 21, 1999) (unpublished). Because Dr. Zaldivar did not identify the etiology of claimant's asthma, a respiratory impairment, or explain that the asthma was not significantly related to or aggravated by claimant's exposure to coal dust, the Board held that the administrative law judge properly found Dr. Zaldivar's opinion insufficient to establish rebuttal pursuant to Section 727.203(b)(3). *Id.*

Employer, however, notes that Dr. Zaldivar, during his October 20, 1997 deposition,

indicated that claimant did not have any disease of the lungs related to his coal mine dust exposure. *See* Employer's Exhibit 8 at 10-11. Upon further consideration, we hold that Dr. Zaldivar's opinion, if credited, could support a finding of subsection (b)(3) rebuttal inasmuch as it indicates that claimant's pulmonary impairment was not related to his coal dust exposure. Consequently, on remand, the administrative law judge is instructed to consider whether Dr. Zaldivar's opinion is sufficient to establish subsection (b)(3) rebuttal.

In light of the above referenced errors, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §727.203(b)(3) and remand the case for further consideration. On remand, the administrative law judge is instructed to reconsider whether employer has satisfied its burden of establishing rebuttal pursuant to 20 C.F.R. §727.203(b)(3). *Massey*, *supra*.

Employer also argues that the administrative law judge erred in finding the evidence insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(4).[9] In her consideration of whether the evidence was sufficient to establish subsection (b)(4) rebuttal, the administrative law judge first considered the x-ray evidence. In determining whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge acted within her discretion by according greater weight to the interpretations of claimant's most recent x-rays taken on February 24, 1997 and September 24, 1997. *See Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983); Decision and Order on Remand at 6. The administrative law judge also properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order on Remand at 6. Of the seven dually qualified physicians to interpret claimant's February 24, 1997 x-ray, five interpreted the film as positive for pneumoconiosis. Claimant's Exhibits 1, 2. Three such dually qualified physicians interpreted claimant's September 24, 1997 x-ray as negative for pneumoconiosis. Employer's Exhibit 3. The administrative law judge found no basis to accept the interpretations of claimant's September 24, 1997 x-ray over the interpretations of claimant's February 24, 1997 x-ray. Inasmuch as we find no error in the administrative law judge's consideration of the x-ray evidence, we affirm the administrative law judge's finding that the x-ray evidence does not assist employer in establishing subsection (b)(4) rebuttal.

Employer next contends that the administrative law judge erred in her consideration of the earlier medical evidence, *i.e.*, evidence submitted prior to claimant's request for modification. In her consideration of whether the medical opinion evidence was sufficient to establish subsection (b)(4) rebuttal, the administrative law judge noted that the opinions of Drs. Piracha, Daniel and Qazi supported Dr. Rasmussen's finding of pneumoconiosis. Decision and Order on Remand at 8; Director's Exhibits 8, 30, 63. The administrative law judge, however, erred in failing to address whether these opinions were sufficiently reasoned. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge also erred in failing to consider whether numerous negative readings of

[9] The Fourth Circuit has held that in order to establish rebuttal pursuant to subsection (b)(4), the party opposing entitlement must prove that the miner does not have pneumoconiosis, in either the clinical or legal sense. *See* 20 C.F.R. §727.202; *Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-67 (4th Cir.1995).

the July 9, 1986 x-ray that Drs. Daniel and Qazi relied upon in diagnosing pneumoconiosis call into question the reliability of their conclusions. *See Winters v. Director, OWCP*, 6 BLR 1-877 (1984); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983).

Employer also challenges the administrative law judge's consideration of Dr. Tuteur's opinion. The administrative law judge accorded less weight to Dr. Tuteur's opinion because of his change in position regarding whether pneumoconiosis could cause an obstructive impairment. Decision and Order on Remand at 7. The administrative law judge stated that:

> I also continue to discount Dr. Tuteur's earlier opinion, and to assign less weight to his more recent one, to the extent that he has relied upon the assumption that obstructive disorders cannot be caused by coal mine dust exposure, for the reasons stated in my previous opinion, and to the extent that he Dr. Tuteur may have modified his opinion to comply with the case law, it would undermine his credibility. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 173 (4th Cir. 1995) (finding that [a] physician cannot base his opinion on the assumption that obstructive disorders can never be caused by coal mine dust exposure as such a position is inimical to the Act).

Decision and Order on Remand at 7.

The Board previously held that substantial evidence supported the administrative law judge's finding that Dr. Tuteur's 1988 opinion rested upon an erroneous medical assumption, *i.e.*, that because claimant's impairment was obstructive, not restrictive, in nature, it could not be due to coal workers' pneumoconiosis. *Hamblin v. Eastern Associated Coal Corp.*, BRB No. 99-0149 BLA (Oct. 21, 1999) (unpublished). The Board further held that the administrative law judge, on remand, could consider the change in Dr. Tuteur's opinions when assessing the credibility of his opinion. We, therefore, hold that the administrative law judge properly discredited Dr. Tuteur's opinion pursuant to 20 C.F.R. §727.203(b)(4).

Finally, we note that the administrative law judge's weighing of the opinions of Drs. Rasmussen and Fino pursuant to 20 C.F.R. §727.203(b)(4) is essentially the same as her analysis of these opinions pursuant to 20 C.F.R. §727.203(b)(3). *See* Decision and Order on Remand at 7. Because of the administrative law judge's above-referenced errors at Section 727.203(b)(3), we also vacate the administrative law judge's finding that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(4).[10]

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[10]On remand, the administrative law judge is also instructed to consider whether Dr. Zaldivar's opinion supports a finding of subsection (b)(4) rebuttal. *See* Employer's Exhibits

Relying upon *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000), *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999) and *Lane Hollow Coal Co. v. Director, OWCP [Lockhart],* 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), employer argues that liability should be transferred to the Trust Fund. Employer contends that the "protracted proceedings" and numerous errors committed by the administrative law judge constitute a denial of due process. Employer argues that it has effectively been denied the opportunity to defend itself. The administrative law judge rejected employer's contention that liability should transfer to the Trust Fund. The administrative law judge found that the circumstances of the instant case were not so "egregious" as to justify such a transfer of liability. Decision and Order on Remand at 8.

5, 8.

We note our agreement with the Director that the facts of the instant case are distinguishable from those of *Lockhart*, *Borda* and *Holdman*.[11] In the instant case, employer was notified of the miner's February 4, 1980 claim on May 6, 1986. Director's Exhibit 26.

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[11]In *Lockhart*, *supra*, the Fourth Circuit held that the Department of Labor's inexcusable delay in notifying the employer of its potential liability deprived it of the opportunity to mount a meaningful defense. The Fourth Circuit, therefore, held that benefits were to be paid from the Black Lung Disability Trust Fund (Trust Fund).

In *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999), the Fourth Circuit noted that *Lockhart* established a straight forward test for determining whether an employer has been denied due process by the government's delay in notification of potential liability: Did the government deprive the employer of "a fair opportunity to mount a meaningful defense to the proposed deprivation of its property?" *Borda*, 171 F.3d at 183, 21 BLR at 2-559-560 (citation omitted). The Fourth Circuit emphasized that it "is not the mere fact of the government's delay that violates due process, but rather the prejudice resulting from such delay." *Borda*, 171 F.3d at 183, 21 BLR at 2-560.

In *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000), the Sixth Circuit held that liability should be transferred to the Trust Fund because the Department of Labor had failed to safeguard the record, resulting in the employer not having access to certain evidence.

Employer also received timely notice of the miner's April 1996 request for modification. Director's Exhibits 149-151. Moreover, employer has not identified any harm that resulted from the delays in the processing of the miner's claim or request for modification. Consequently, we hold that the Department of Labor did not deprive employer of a fair opportunity to mount a meaningful defense in the instant case. Consequently, we decline to transfer liability to the Trust Fund.

Employer finally requests that the case be remanded to a different administrative law judge. However, because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, employer's request is denied. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

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.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge