

BRB No. 00-0829 BLA

LARRY D. FULLER)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED:
)	
SOUTH HOLLOW COAL COMPANY, INC.)	
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on the Record - Awarding Benefits of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Edward Waldman (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 (1998-BLA-00232) of Administrative Law Judge Lawrence P. Donnelly 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 This case has been before the Board previously. Claimant filed an application for black lung benefits on November 11, 1974 with the Social Security Administration (SSA), but there is no evidence in the file as to a ruling on that claim. Claimant subsequently filed another claim with the Department of Labor (DOL) on February 18, 1975, which was denied on August 23, 1976. Within thirty days of the denial, on September 14, 1976, claimant advised the DOL of his intent to submit additional medical evidence and requested that his claim be held open. When the DOL did not receive any further medical evidence, a second denial was issued on June 2, 1977. Thereafter, the DOL reopened the claim for reconsideration pursuant to the 1977 Amendments. On March 10, 1983, the DOL issued a letter advising that liability for the case did not transfer to the Black Lung Disability Trust Fund (Trust Fund). A formal hearing was held before Administrative Law Judge V. M. McElroy, who issued a Decision and Order denying benefits on December 1, 1987. Judge McElroy credited claimant with twenty-six years of coal mine employment and found that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4), but that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4). Judge McElroy further found that the rebuttal findings under both Section 727.203(b)(3) and (b)(4) preclude entitlement to benefits under the permanent criteria of 20 C.F.R. Part 410, Subpart D. Furthermore, Judge McElroy found that the rebuttal finding under Section 727.203(b)(4) precluded entitlement under 20 C.F.R. §410.490. Accordingly, benefits were denied.

Claimant appealed the denial of benefits to the Board and in *Fuller v. South Hollow Coal Co.*, BRB No. 87-3858 BLA (May 31, 1990)(unpub.), the Board affirmed in part, vacated in part and remanded the case, directing Judge McElroy on remand to consider the medical reports from Dr. Buddington under Section 727.203(b)(3) and to determine whether

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. There are no revisions to 20 C.F.R. Part 727.

liability for benefits should transfer to the Trust Fund.

On remand, in his Decision and Order issued on May 7, 1992, Judge McElroy again found that employer established rebuttal of the interim presumption pursuant to Section 727.203(b)(3) and (b)(4). Accordingly, benefits were denied.

Claimant requested modification of the denied claim on October 16, 1992, within one year of the denial, and submitted new medical evidence with his request. The district director initially determined that claimant was entitled to benefits, but employer controverted the finding and requested a formal hearing. The claim was referred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Julius J. Johnson.² In his Decision and Order dated September 26, 1994, Judge Johnson found that claimant established invocation of the interim presumption pursuant to Section 727.203(a)(1)-(4), but found that the interim presumption was rebutted under Section 727.203(b)(3) because employer ruled out any causal relationship between claimant's disability and his coal mine employment. Thus, Judge Johnson found that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 (1999), but did not address whether or not there was a mistake in a determination of fact with regard to the prior denial.³ Accordingly, modification and benefits were denied.

Claimant appealed the denial of benefits to the Board and in *Fuller v. South Hollow Coal Company, Inc.*, BRB No. 95-0512 BLA (Sept. 27, 1995)(unpub.), the Board vacated Judge Johnson's determination that employer established rebuttal of the interim presumption pursuant to Section 727.203(b)(3) and vacated his finding that claimant failed to establish a change in conditions pursuant to Section 725.310 (1999). The Board remanded the case with instructions to reweigh the medical opinion evidence under Section 727.203(b)(3) and to

² The case was reassigned to Judge Johnson as Judge McElroy was no longer available to the Office of Administrative Law Judges to render a decision in this case.

³ The amendments to the regulation at 20 C.F.R. §725.310 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. See 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

determine whether claimant was entitled to modification under Section 725.310 (1999) based on a mistake in a determination of fact as well as to determine, if necessary, whether liability for benefits should transfer to the Trust Fund.

On remand to the Office of Administrative Law Judges, the case was reassigned to Administrative Law Judge Fletcher E. Campbell, Jr., who issued a Decision and Order on Remand on September 18, 1996.⁴ In his Decision and Order, Judge Campbell reweighed the evidence in accordance with the Board's instructions and found that the evidence was insufficient to establish a change in condition or a mistake in a determination of fact under Section 725.310 (1999). Judge Campbell further found that employer established rebuttal of the interim presumption pursuant to Section 727.203(b)(3). Accordingly, modification and benefits were denied.

Claimant appealed the denial of benefits to the Board and, while the appeal was pending at the Board, claimant requested that the Board remand the case for modification proceedings. By Order dated June 19, 1997, the Board granted claimant's request, dismissed his pending appeal in BRB No. 97-0184 BLA and remanded the case to the district director for modification proceedings. *Fuller v. South Hollow Coal Co.*, BRB No. 97-0184 BLA (June 19, 1997)(unpub. Order).

On remand, the district director initially determined that claimant was entitled to benefits, but employer controverted the finding and requested a formal hearing. The claim was referred to the Office of Administrative Law Judges and assigned to Judge Donnelly (the administrative law judge). The administrative law judge considered the previously submitted evidence and the evidence developed and submitted subsequent to the previous denial, which included x-ray readings, CT scans, biopsy evidence, pulmonary function studies, arterial blood gas studies and medical opinions. The administrative law judge found that the biopsy evidence established invocation of the interim presumption pursuant to Section 727.203(a)(1), thus precluding rebuttal of the interim presumption pursuant to Section 727.203(b)(4). The administrative law judge also found that employer did not establish that claimant's totally disabling pulmonary or respiratory impairment did not arise in whole or in part out of coal mine employment. Thus, the administrative law judge found a mistake of fact pursuant to Section 725.310 (1999) in the previous finding that rebuttal of the interim presumption had been established pursuant to Section 727.203(b)(3). Accordingly, the administrative law judge granted modification and awarded benefits. The administrative law judge further found that liability for the payment of benefits did not transfer to the Trust Fund and that, therefore, employer is liable for the payment of benefits, augmented by reason of

⁴ The case was reassigned to Judge Campbell as Judge Johnson was no longer available to the Office of Administrative Law Judges to render a decision in this case.

one dependent, commencing April 1, 1981, the month after claimant ceased his coal mine employment.

On appeal herein, employer contends that the administrative law judge lacked jurisdiction to consider this claim, erred in his evaluation of the medical opinions pursuant to Section 727.203(b)(3) and erred in failing to transfer liability for the payment of benefits to the Trust Fund. Claimant did not file a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds in support of a party's right to file multiple modification requests and in defense of the administrative law judge's finding that employer is liable for the payment of any benefits awarded in this case. Employer filed a reply brief, reiterating the arguments contained in its Petition for Review and brief.

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 Association 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 the Director has responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant and the employer have not responded to the Board's order.⁵ Based on the brief submitted by the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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).

Employer initially contends that the administrative law judge erred in adjudicating

⁵ Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 9, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

claimant's second request for modification pursuant to Section 725.310 (1999), arguing that the modification procedure authorized by Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a) and implemented at Section 725.310 (1999), does not permit multiple modification requests. Employer concedes, however, that its argument fails in light of the holding of the United States Court of Appeals for the Fourth Circuit in *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999), that modification is available within a year of each rejection of a claim, but disagrees with the Fourth Circuit's conclusion. In light of the court's holding, we reject employer's argument and hold that the administrative law judge properly adjudicated claimant's second modification request.

With respect to the merits, employer contends that the administrative law judge erred in finding that employer failed to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3), arguing that the administrative law judge erred in requiring employer to prove that claimant's disability was not caused by his coal mine employment. 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 Cox v. Shannon-Pocahontas Mining Co.*, 6 F.3d 199, 18 BLR 2-31 (4th Cir. 1993); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *see also Phillips v. Jewell Ridge Coal Co.*, 825 F.2d 408, 10 BLR 2-160 (4th Cir. 1987); *see generally Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993). 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). In *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), the Fourth Circuit held that a physician's finding of no respiratory or pulmonary impairment is sufficient to satisfy the standard enunciated in *Massey* only where the relevant medical opinion states, without equivocation, that the miner suffers no respiratory or pulmonary impairment of any kind, and furthermore, in cases where the interim presumption is invoked under Section 727.203(a)(1), where the physician has not based his finding on an erroneous finding that the miner does not suffer from pneumoconiosis. *See Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995).

In the instant case, the administrative law judge properly reviewed the evidence of record pursuant to Section 725.310 (1999) *de novo*, and permissibly disagreed with the credibility determinations previously rendered by Judges McElroy, Johnson and Campbell pursuant to Section 727.203(b)(3), *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), since he found that their ultimate conclusion that the evidence was sufficient to establish rebuttal thereunder was incorrect. In evaluating the evidence relevant to

subsection (b)(3) rebuttal, the administrative law judge reasonably determined that the opinions of Drs. Buddington, Robinette, Forehand and Perper, which support a finding that claimant's totally disabling impairment is due, at least in part, to his lengthy coal mine employment, outweighed the opinions of Drs. Kleinerman, Garzon, Dahhan, Fino and Castle, who concluded that claimant had an obstructive impairment solely due to smoking. Decision and Order on Remand at 15-16. The administrative law judge reasonably discounted the opinions of Drs. Dahhan, Fino and Castle, which ruled out pneumoconiosis as a contributing factor in claimant's total disability and which were previously credited by Judge Campbell, as he found that the reasoning behind these opinions was flawed since these physicians relied on the proposition that because there was no proof that dust exposure alone can produce disabling obstruction, all of the obstruction was attributable to smoking. *Id.* The administrative law judge rationally concluded, therefore, that their opinions were insufficient to rule out coal mine employment as a cause of claimant's total disability under Section 727.203(b)(3). *Id.*; *Cox, supra*; *Phillips, supra*; *Massey, supra*.

Employer's contention regarding the administrative law judge's substitution of his opinion for that of the medical experts under Section 727.203(b)(3) is without merit. The administrative law judge rationally relied on Dr. Perper's opinion to find that a connection between obstruction and coal dust exposure was not ruled out, thus supporting the conclusion that claimant's total disability was substantially due to coal dust exposure. *Id.* The administrative law judge acted within his discretion as trier-of-fact, therefore, in rejecting, as unpersuasive, the opinions of Drs. Kleinerman, Castle, Garzon, Fino and Dahhan as compared to the detailed and fully explained opinion of Dr. Perper, *see generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), that claimant's disability was related, at least in part, to dust exposure in coal mine employment and was not attributable solely to smoking. The administrative law judge also permissibly determined that Dr. Perper's opinion was sufficient to establish a mistake of fact in the previous finding that rebuttal of the interim presumption pursuant to subsection (b)(3) was established. Decision and Order on Remand at 16; *see Massey, supra*; *see also Grigg, supra*; *Lockhart, supra*. Furthermore, contrary to employer's contention, the administrative law judge acknowledged the qualifications of the physicians in his discussion of their opinions. Decision and Order on Remand at 11-13. Inasmuch as the administrative law judge's rationale comports with *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), in which the United States Court of Appeals for the Fourth Circuit indicated that the administrative law judge must consider the credentials of the respective physicians and the extent to which their opinions are documented, the administrative law judge acted within his discretion in determining that the opinions of Drs. Kleinerman, Castle, Garzon, Fino and Dahhan were insufficient to establish rebuttal pursuant to Section 727.203(b)(3). *See Akers, supra*; *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *see also Milburn Colliery Company v. Hicks*, 138 F.2d 524, 21 BLR 2-323 (4th Cir. 1998).

The administrative law judge has broad discretion in weighing and assessing the evidence of record in determining whether a party has met its burden of proof and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we affirm the administrative law judge's determination that the evidence of record was insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3). Consequently, we affirm the administrative law judge's findings thereunder and affirm his award of benefits.

Next, pursuant to the Board's instructions, the administrative law judge addressed the remaining issue, the applicability of the transfer of liability regulations. In regards to employer's status regarding its liability for this claim, under the 1981 Amendments, liability transfers from coal operators to the Trust Fund for claims which were denied prior to March 1, 1978, the effective date of the Black Lung Benefits Reform Act of 1977, and which are or have been approved under Section 435, the reviewing provision of the Act. 30 U.S.C. §932(j)(3); 26 U.S.C. §9501(d)(1)(B). Employer contends that the administrative law judge erred in failing to transfer liability for payment of benefits on the miner's claim to the Trust Fund under Section 725.496. We disagree.

In order for a claim filed with and denied by SSA prior to March 1, 1978 to qualify for transfer, a request must have been made for Section 435 review of the miner's original claim, and such claim must be approved under the provisions of Section 435 of the Act. 30 U.S.C. §945; 20 C.F.R. §725.496(d). Claimant must, therefore, have had his claim denied by SSA and have filed a valid election card requesting Section 435 review within six months of notification, unless good cause for failure to timely respond is established. 20 C.F.R. §410.704(d). Employer concedes that "the file contains no official documents regarding the SSA claim" but argues that the claim filed in 1974 was a Part B claim and that the claim filed in 1975 was finally denied before March 1, 1977. However, the administrative law judge reasonably found that there was no credible evidence of a denial by SSA since claimant was inconsistent in his recollection of the disposition of the 1974 SSA claim and the 1975 claim filed with the DOL was not finally denied before March 1, 1977. 20 C.F.R. §725.496(b)(1), (2); Decision and Order on Remand at 18. The administrative law judge's findings and inferences are rational and supported by substantial evidence, and we may not substitute our judgment for his. *See Anderson, supra*. We therefore affirm the administrative law judge's findings under Section 725.496.

Accordingly, the administrative law judge's Decision and Order on Remand granting modification and awarding 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