BRB No. 05-0567 BLA

LESLIE WHITMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 03/28/2006
	)	
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (84-BLA-9098) of Administrative Law Judge Linda S. Chapman (the administrative law judge) 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 on six prior occasions.[2] On the last appeal by employer, the Board affirmed the administrative law judge's finding that the evidence is sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2) (2000).[3] However, the Board vacated the administrative law judge's findings that the evidence is insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4) (2000), and remanded the case for further consideration of the evidence. Citing *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988), the Board instructed the administrative law judge, on remand, to consider the chronology of the relevant evidence in relation to the 1981 and 2000 pulmonary function studies upon which the administrative law judge relied to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2) (2000), in determining the issue of rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4) (2000). Further, the Board instructed the administrative law judge to determine claimant's entitlement to benefits under 20 C.F.R. Part 718, if she finds that claimant is not entitled to benefits under 20 C.F.R. Part 727. With regard to the issue of onset, the Board held that the administrative law judge's finding of April 1, 1981 as the date upon which benefits commence was erroneous because that finding was based on the April 21, 1981 pulmonary function study that she relied upon to find invocation of the interim presumption established, rather than on all the relevant evidence of record.

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The full procedural history of this case through the time of the last appeal is set forth in the following Board decisions: *Whitman v. Peabody Coal Co.*, BRB No. 87-2473 BLA (June 30, 1989)(unpub.); *Whitman v. Peabody Coal Co.*, BRB No. 90-0217 BLA (Mar. 30, 1993)(unpub.); *Whitman v. Peabody Coal Co.*, BRB No. 90-0217 BLA (Aug. 11, 1995)(unpub. Order on Motion for Reconsideration); *Whitman v. Peabody Coal Co.*, BRB No. 97-0720 BLA (Mar. 5, 1998)(unpub.); *Whitman v. Peabody Coal Co.*, BRB No. 98-1519 BLA (Aug. 20, 1999)(unpub.); *Whitman v. Peabody Coal Co.*, BRB No. 01-0130 BLA (Dec. 19, 2001)(unpub.); and *Whitman v. Peabody Coal Co.*, BRB Nos. 03-0741 BLA and 03-0741 BLA-A (July 23, 2004)(unpub.).

[3]In its July 23, 2004 Decision and Order, the Board declined to address claimant's objection, on cross-appeal, to the admission by Administrative Law Judge Linda S. Chapman (the administrative law judge) of Dr. Wiot's December 29, 2000 report, based on the facts of the case. *Whitman v. Peabody Coal Co.*, BRB Nos. 03-0741 BLA and 03-0741 BLA-A, slip op. at 12 (July 23, 2004)(unpub.).

Consequently, the Board instructed the administrative law judge, on remand, to reconsider the date upon which benefits commence. Lastly, the Board held that employer has not been denied due process in that it was timely notified of the claim, it developed evidence, and it participated in each phase of the adjudication. Moreover, the Board noted that employer has shown no prejudice to it, based on the proceedings' duration. *Whitman v. Peabody Coal Co.*, BRB Nos. 03-0741 BLA and 03-0741 BLA-A (July 23, 2004)(unpub.).

On remand, the administrative law judge found the evidence insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) and (b)(4) (2000). Accordingly, the administrative law judge awarded benefits, and determined that they commence as of April 1978, the month in which the claim was filed.

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(2) (2000). Employer also challenges the administrative law judge's finding that the evidence is insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) and (b)(4) (2000). Further, employer challenges the administrative law judge's determination that benefits commence as of April 1978. Lastly, employer contends that it should be dismissed as the responsible operator and liability for benefits should be transferred to the Black Lung Disability Trust Fund (Trust Fund) because its right to due process has been violated by the length of these proceedings. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the administrative law judge erred in ordering benefits to commence as of April 1978, the month that the claim was filed. The Director also contends that there is no basis for relieving employer of liability for the claim.

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 initially contends that the administrative law judge previously erred in finding the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(2) (2000), in her July 7, 2003 Decision and Order. Based on her consideration of the pulmonary function study evidence as a whole, the administrative law judge found it sufficient to establish invocation of the interim presumption at Section 727.203(a)(2) (2000). 2003 Decision and Order at 14. In its July 23, 2004 Decision and Order, the Board affirmed the administrative law judge's finding thereunder. *Whitman v. Peabody Coal Co.*, BRB Nos. 03-0741 BLA and 03-0741 BLA-A, slip op. at 5 (July 23, 2004)(unpub.). The doctrine of the law of the case is a discretionary rule of practice

based on the policy that once an issue is litigated and decided, the matter should not be re-litigated. *United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186 (1950), *reh'g denied*, 339 U.S. 972 (1950). However, under the law of the case doctrine, it is proper for a court to depart from a prior holding if there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the decision is clearly erroneous and not in the interest of justice. *Cale v. Johnson*, 861 F.2d 943 (6th Cir. 1988), citing *Arizona v. California*, 460 U.S. 605 (1983); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989) (Brown, J. dissenting); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). As there is no persuasive evidence that the law of the case doctrine is inapplicable, or that one of the exceptions to it noted *supra*, has been demonstrated, the Board's previous disposition of the case at 20 C.F.R. §727.203(a)(2) (2000) will stand. We thus decline to revisit this issue. *Cale*, 861 F.2d at 947; *Brinkley*, 14 BLR at 1-150-151; *Williams*, 22 BRBS at 237; *Bridges*, 6 BLR at 1-989-990.

Employer next contends that the administrative law judge erred in finding the evidence insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4) (2000). In order to establish rebuttal of the interim presumption at Section 727.203(b)(4) (2000), employer must establish, by persuasive evidence, that the miner has neither clinical pneumoconiosis nor legal pneumoconiosis, as defined by the Act. 20 C.F.R. §§727.202 (2000) and 727.203(b)(4) (2000); *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987); *see also Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989). In addressing rebuttal of the interim presumption at Section 727.203(b)(4) (2000), the administrative law judge considered the relevant x-ray readings and medical reports of record.

The x-ray evidence in the record consists of twenty-nine readings of ten x-rays dated November 20, 1978, March 6, 1981, April 21, 1981, September 29, 1981, October 15, 1981, December 15, 1982, June 20, 1986, February 8, 2000, August 30, 2002, and October 2, 2002. Director's Exhibits 10, 11, 16, 23, 24-26; Claimant's Exhibits 3, 4; Employer's Exhibits 1-3; Administrative Law Judge's Exhibits 3, 4, 7, 9, 10. The administrative law judge accorded greater weight to the x-ray readings by physicians who are dually qualified as B readers and Board-certified radiologists. 2005 Decision and Order at 12-13; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). The December 15, 1982, August 30, 2002, and October 2, 2002 x-rays were read as positive for pneumoconiosis by Drs. Bassali and Brandon, B readers and Board-certified radiologists, Claimant's Exhibit 4; Administrative Law Judge's Exhibits 4, 10, while the November 20, 1978, September 29, 1981, December 15, 1982, June 20, 1986, August 30, 2002, and October 2, 2002 x-rays were read as negative for pneumoconiosis by Drs. Cole, Felson, Pendergrass, Quillin, and Wiot, B readers and Board-certified radiologists. Director's Exhibit 26; Employer's Exhibits 1-3; Administrative Law Judge's Exhibit 9. Taking into consideration the dual

qualifications of the physicians, the administrative law judge weighed together the interpretations of each x-ray to determine whether an x-ray established the existence of pneumoconiosis individually. Based on this method of weighing the x-ray evidence, the administrative law judge found that only two of the ten x-rays established the existence of pneumoconiosis. 2005 Decision and Order at 12-13. Thus, based on her consideration of both the qualitative nature and quantitative nature of the conflicting x-ray readings, the administrative law judge found the x-ray evidence insufficient to establish the existence of pneumoconiosis. Nonetheless, the administrative law judge stated that "[a]lthough the evidence does not establish that the [c]laimant suffers from *clinical* pneumoconiosis, given the preponderantly negative chest x-ray interpretations of record, I find that the medical opinion evidence does support a finding that he suffers from *legal* pneumoconiosis – *i.e.*, coal dust-induced chronic bronchitis or chronic obstructive pulmonary disease arising from coal dust exposure." *Id*. at 14.

Turning to the medical opinion evidence, the administrative law judge considered the reports of Drs. Calhoun, Gallo, Getty, Glazer, O'Bryan, Powell, Simpao, and West.[4] In an April 21, 1981 report, Dr. Calhoun diagnosed severe emphysema and coal workers' pneumoconiosis related to coal dust exposure. Director's Exhibit 10. In a December 27, 1982 report, Dr. Getty diagnosed arteriosclerotic heart disease and chronic bronchitis. Director's Exhibit 25. Dr. Getty stated, "I feel his cough is based on a chronic bronchitis" and "[t]his could be most likely caused by coal dust inhalation." *Id*. Dr. Getty also opined that there is no pneumoconiosis or obstructive pulmonary disease. *Id*. Further, Dr. Getty stated that claimant's primary complaint of dyspnea is related to coronary artery disease. *Id*. Dr. Glazer, in a February 11, 2002 report, diagnosed ischemic heart disease and coal miner's pneumoconiosis. Administrative Law Judge's Exhibit 6. In a December 14, 1978 report, Dr. Simpao diagnosed chronic pulmonary fibrosis and chronic bronchitis and opined that claimant's pulmonary condition could be attributed to his previous job as a coal miner. Director's Exhibit 12. During a May 27, 1982 deposition, Dr. Simpao diagnosed coal workers' pneumoconiosis, chronic pulmonary fibrosis, and chronic bronchitis. Director's Exhibit 23. When asked about the etiology of claimant's chronic pulmonary fibrosis, Dr. Simpao testified that this condition is related to coal dust exposure. *Id*. However, when asked about the etiology of claimant's chronic bronchitis, Dr. Simpao testified that "[t]he environmental effect - - or

[4]The administrative law judge stated that "[Dr. Anderson] addressed only the presence of clinical pneumoconiosis, not legal pneumoconiosis." 2005 Decision and Order at 14 n.2. During a January 4, 1982 deposition, Dr. Anderson opined that claimant did not have coal workers' pneumoconiosis based on x-ray readings and coal dust exposure history. Director's Exhibit 24.

Dr. Fino, in a November 10, 2002 report, did not render an opinion concerning the existence of pneumoconiosis. Administrative Law Judge's Exhibit 8.

rather, some inhalation of dust [as a coal miner] *might* cause this kind of irritation in the bronchial tree." *Id*. (emphasis added). In a June 29, 1981 report, Dr. West diagnosed pneumoconiosis related to coal dust exposure. Director's Exhibit 11. During a December 2, 1981 deposition, Dr. West testified that "[claimant] stated that he had a cough which was occasionally productive." Director's Exhibit 23. Dr. West also stated that all of his findings were related to, compatible with, and strongly suggestive of a chronic, rather far-advanced lung disease." *Id*. Dr. West further opined that claimant has an occupational lung disease based on x-ray findings and work history, which is coal workers' pneumoconiosis related to coal dust exposure. *Id*.

In contrast, Dr. Gallo, in an October 15, 1981 report, noted that "[t]here is some cough but it is normally nonproductive." Director's Exhibit 24. During a February 18, 1982 deposition, Dr. Gallo testified that claimant did not have pneumoconiosis based on an x-ray reading. *Id*. Dr. Gallo also testified that he did not diagnose chronic bronchitis because claimant's cough is non-productive. *Id*. When asked if claimant's cough is always non-productive or just normally non-productive, Dr. Gallo testified that claimant's cough is normally non-productive, which indicates that it is predominately non-productive. *Id*. Dr. Gallo testified that the minimum definition of bronchitis by history is cough and sputum production for three months out of a year for at least two consecutive years. *Id*. In an undated report, Dr. O'Bryan opined that claimant has no occupationally related lung disease. Administrative Law Judge's Exhibit 3. Further, in a February 8, 2000 report, Dr. O'Bryan diagnosed dyspnea related to age, mild restrictive impairment and an unknown heart disease, and opined that there is no pneumoconiosis. *Id*. Dr. O'Bryan also opined that "[claimant] did not give a history consistent with chronic bronchitis." *Id*. In an October 2, 2002 report, Dr. Powell opined that there is no coal workers' pneumoconiosis. Administrative Law Judge's Exhibit 7. Based on her consideration of the medical opinion evidence, the administrative law judge discounted Dr. Getty's opinion and found that the opinions of Drs. Calhoun, Glazer, Simpao, and West outweighed the contrary opinions of Drs. Gallo, O'Bryan, and Powell.

Employer asserts that the administrative law judge erred in failing to provide a valid reason for crediting the opinions of Drs. Calhoun, Glazer, Simpao, and West over the contrary opinions of Drs. Gallo, O'Bryan, and Powell. In addressing the issue of legal pneumoconiosis, the administrative law judge summarized the opinions of Drs. Calhoun, Gallo, Getty, Glazer, O'Bryan, Powell, Simpao, and West. The administrative law judge specifically stated:

> Of the physicians who diagnosed chronic bronchitis or chronic obstructive pulmonary disease, Dr. Glazer, Dr. Calhoun, Dr. West, and Dr. Simpao concluded that the condition is coal dust related. Likewise, Dr. Getty opined that the [c]laimant suffers from chronic bronchitis that is "*most likely*" the result of coal dust inhalation.

2005 Decision and Order at 14. The administrative law judge also stated that "Dr. Gallo, Dr. Powell and Dr. O'Bryan, on the other hand, did not diagnose the presence of a coal-induced chronic bronchitis or chronic obstructive pulmonary disease." *Id*. (footnote omitted).

Taking claimant's cough and sputum production symptoms into consideration, the administrative law judge discounted the opinions of Drs. Gallo, O'Bryan, and Powell because they did not diagnose chronic bronchitis related to coal dust exposure. With regard to Dr. Gallo's opinion, the administrative law judge stated:

> Based on the foregoing definition, the [c]laimant's general reported symptoms of a "normally non-productive" cough would still satisfy Dr. Gallo's criteria for diagnosing chronic bronchitis. The word "normally" is defined as "under normal circumstances; ordinarily." The word "ordinarily" is defined as "usually, as a rule." It is reasonable that, where a miner's cough is not productive nine months out of a year, then it is "normally" non-productive. Dr. Gallo's failure to more specifically explain his diagnosis, in light of the commonly accepted usage of the word "normally" and the criteria for diagnosing chronic bronchitis, renders his report neither well-reasoned nor well-documented.

Id. at 14-15 (footnotes omitted). The administrative law judge also found that Dr. Powell's opinion is not well documented because his opinion is contrary to the preponderance of the other physicians of record, who stated that claimant suffered from a productive cough to varying degrees.[5] *Id*. at 15. Further, the administrative law judge found that Dr. O'Bryan's opinion is not persuasive, relying on Dr. Gallo's criteria for diagnosing chronic bronchitis.[6] *Id*. The administrative law judge specifically stated:

> …under the criteria set forth by Dr. Gallo, a person need not experience *daily* sputum production to suffer from chronic bronchitis; rather, there must be coughing and sputum production three months out of the year for

[5]In an October 2, 2002 report, Dr. Powell stated that claimant does cough some at night and during the day, but it is not productive. Administrative Law Judge's Exhibit 7.

[6]In a February 8, 2000 report, Dr. O'Bryan checked the box marked "NO" to indicate that claimant did not report a history of chronic bronchitis. Administrative Law Judge's Exhibit 3. Although Dr. O'Bryan, in the same report, checked the box marked "YES" to indicate that claimant reported symptoms of a cough, he checked the box marked "NO" to indicate that claimant did not report symptoms of daily sputum production. *Id*.

> at least two consecutive years. Dr. O'Bryan's opinion is not persuasive considering the definition of chronic bronchitis and the lack of specificity in his medical findings related to sputum production.

Id. at 15.

As argued by employer, we hold that the administrative law judge erroneously substituted her opinion for that of Drs. Gallo, O'Bryan, and Powell to the extent she found that claimant's cough and sputum production symptoms satisfy Dr. Gallo's criteria for diagnosing chronic bronchitis. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). In addition, we hold that the administrative law judge mischaracterized the opinions of Drs. Glazer and West by finding that they diagnosed chronic bronchitis or chronic obstructive pulmonary disease related to coal dust exposure. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Contrary to the administrative law judge's finding, neither Dr. Glazer nor Dr. West diagnosed chronic bronchitis or chronic obstructive pulmonary disease. Administrative Law Judge's Exhibit 6; Director's Exhibit 11. Dr. Glazer diagnosed clinical pneumoconiosis, rather than legal pneumoconiosis. Administrative Law Judge's Exhibit 6.

Based on the foregoing, we vacate the administrative law judge's finding that the evidence is insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4) (2000), and remand the case for further consideration of the evidence therein. Moreover, the administrative law judge on remand must provide a basis for her weighing of Dr. Getty's opinion. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge emphasized that Dr. Getty used the words "most likely" in summarizing Dr. Getty's diagnosis of chronic bronchitis related to coal dust inhalation. 2005 Decision and Order at 14. However, in weighing the medical opinion evidence, the administrative law judge merely stated that Dr. Getty's opinion was not persuasive on the question of chronic bronchitis and its relationship to coal dust exposure. *Id*. at 15.

Furthermore, with respect to the issue of rebuttal of the interim presumption at Section 727.203(b)(4) (2000), the administrative law judge on remand must consider the chronology of the relevant evidence in relation to the 1981 and 2000 pulmonary function studies that the administrative law judge relied on to establish invocation of the interim presumption at Section 727.203(a)(2) (2000). *Cooley*, 845 F.2d at 623-24, 11 BLR at 2-148-49 (The interim presumption would be of little value if it can be rebutted by medical opinions based on examinations conducted at a time before claimant established the conditions required to invoke the presumption).

Employer also challenges the administrative law judge's finding that the evidence is insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) (2000). Based on the administrative law judge's consideration of the evidence at 20

C.F.R. §727.203(b)(4) (2000), the administrative law judge found the evidence insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) (2000). The administrative law judge specifically stated, "I find that the opinions of Dr. O'Bryan, Dr. Gallo, Dr. Getty, and Dr. Powell, whose opinions are not persuasive on the question of chronic bronchitis and its relationship to coal dust exposure, and who did not address the issue of legal pneumoconiosis, are not substantial evidence that pneumoconiosis has played no role in the [c]laimant's disability."[7] 2005 Decision and Order at 15. Hence, the administrative law judge linked her finding that the evidence is insufficient to establish rebuttal of the interim presumption at Section 727.203(b)(3) (2000) with her finding that the evidence is insufficient to establish rebuttal of the interim presumption at Section 727.203(b)(4) (2000). Therefore, in light of our decision to vacate the administrative law judge's finding that the evidence is insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4) (2000), we vacate the administrative law judge's finding that the evidence is insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) (2000) and remand the case for further consideration of the evidence therein.[8] *Island Creek Coal Co. v. Holdman*, 202

[7]Contrary to the administrative law judge's finding that Dr. O'Bryan did not address the issue of legal pneumoconiosis, 2005 Decision and Order at 15, Dr. O'Bryan, in an undated report, opined that "[claimant] has not contracted an occupationally related lung disease." Administrative Law Judge's Exhibit 3.

[8]As argued by employer, the administrative law judge erred in failing to follow the Board's remand instruction to apply the standard enunciated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in determining whether the evidence proves rebuttal of the interim presumption at Section 727.203(b)(3) (2000). *Warman v. Pittsburg & Midway Coal 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). Citing *Youghiogheny & Ohio Coal Co. v. McAngues*, 996 F.2d 130, 17 BLR 2-146 (6th Cir. 1993), *cert. denied*, 510 U.S. 1040 (1994), *Warman* and *Gibas*, the Board stated that "[a]t 20 C.F.R. §727.203(b)(3) (2000), it is employer's burden to prove that claimant's total disability did not arise, in whole or in part, out of coal mine employment; that pneumoconiosis played no part in claimant's total disability." *Whitman v. Peabody Coal Co.*, BRB Nos. 03-0741 BLA and 03-0741 BLA-A, slip op. at 5 (July 23, 2004)(unpub.). The administrative law judge, however, found that the opinions of Drs. Gallo, Getty, O'Bryan, and Powell do not sustain employer's burden under Section 727.203(b)(3) (2000), based on her determination that the burden shifts to employer to present medical opinion evidence that sufficiently "rules out" pneumoconiosis as a causative factor of total disability. 2005 Decision and Order at 6. As the Board previously held, the Sixth Circuit, in *McAngues*, did not adopt the "rule out" standard for establishing rebuttal of the interim presumption at Section 727.203(b)(3) (2000). *Whitman*, BRB Nos. 03-0741 BLA and 03-0741 BLA-A, slip op.

F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 19 BLR 2-123 (6th Cir. 1995); *Warman v. Pittsburg & Midway Coal 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).[9] Moreover, with respect to the issue of rebuttal of the interim presumption at Section 727.203(b)(3) (2000), the administrative law judge on remand must consider the chronology of the relevant evidence in relation to the 1981 and 2000 pulmonary function studies that the administrative law judge relied on to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(2) (2000).[10] *Cooley*, 845 F.2d at 623-24, 11 BLR at 2-148-49.

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at 6.

[9]In her March 17, 2005 Decision and Order, the administrative law judge found that the opinions of Drs. Getty and Powell are insufficient, as a matter of law, to establish rebuttal of the interim presumption at Section 727.203(b)(3) (2000) on the ground that they concluded that claimant's respiratory impairment was not significant. 2005 Decision and Order at 7. Contrary to the administrative law judge's finding, the standard enunciated by the Sixth Circuit in *McAngues*, *Warman*, and *Gibas* for rebuttal of the interim presumption at Section 727.203(b)(3) (2000) does not require a finding of no respiratory or pulmonary impairment. Further, as the Board previously held, the administrative law judge erred in construing the opinions of Drs. Getty and Powell, that claimant does not have a significant respiratory or pulmonary impairment, as opinions that imply that Drs. Getty and Powell found some impairment. *Whitman*, BRB Nos. 03-0741 BLA and 03-0741 BLA-A, slip op. at 6. Moreover, in view of the Board's March 5, 1998 holding that, if credited, Dr. Getty's opinion is sufficient to establish rebuttal of the interim presumption at Section 727.203 (2000) under *Gibas*, *Whitman v. Peabody Coal Co.*, BRB No. 97-0720 BLA, slip op. at 5 (Mar. 5, 1998)(unpub.), we hold that the administrative law judge erred in relying on the Board's June 30, 1989 holding that Dr. Getty's opinion that claimant has no significant respiratory impairment is insufficient, as a matter of law, to establish rebuttal of the interim presumption at Section 727.203 (2000), 2005 Decision and Order at 7; *Whitman v. Peabody Coal Co.*, BRB No. 87-2473 BLA, slip op. at 4 n.7 (June 30, 1989)(unpub.).

[10]The administrative law judge erred in substituting her opinion for that of Dr. Campbell. The administrative law judge found that Dr. Campbell, a cardiologist, opined that claimant's heart disease is not the source of his respiratory problems. 2005 Decision and Order at 9. Contrary to the administrative law judge's finding, Dr. Campbell, in a December 3, 1999 report, merely found that claimant's heart ejection fraction (the amount of blood ejected from the pumping chamber), based on his August 16, 1999 isotope study, was normal. Dr. Campbell suggested that a pulmonary function study would be helpful in evaluating the cause of claimant's shortness of breath. Administrative Law Judge's Exhibit 2. Although the administrative law judge found that

Employer additionally contends, and the Director[11] agrees, that the administrative law judge erred in ordering benefits to commence on April 1, 1978, the date the claim was filed. Section 725.503 provides that "[w]here the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed." 20 C.F.R. §725.503(b). The administrative law judge stated that she could not ascertain the date of the onset of total disability, based on her review of the medical evidence of record. 2005 Decision and Order at 16. Consequently, pursuant to Section 725.503, the administrative law judge found that claimant is entitled to benefits as of April 1, 1978, the month in which the claim was filed. *Id*.

Citing *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), employer asserts that the provision of 20 C.F.R. §725.503(b), which allows an administrative law judge to utilize the filing date of a claim as the date from which benefits commence, when there is no medical proof submitted by claimant that he had complicated coal workers' pneumoconiosis or a disabling respiratory impairment caused by pneumoconiosis at the time the claim was filed, violates the Administrative Procedure Act (APA). The APA provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). In *Ondecko*, the United States Supreme Court made plain that the designation "burden of proof" in Section 7(c) referred only to the "burden of persuasion," and not the "burden of production" or the burden of going forward with the evidence. *Ondecko*, 512 U.S. at 276, 18 BLR at 2A-9. Thus, because Section 725.503(b) shifts the burden of production, rather than the burden of proof, we reject employer's assertion that Section 725.503(b) is impermissible under *Ondecko* and Section 7(c) of the APA. *Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001), *aff'd in part and rev'd in part on other grounds*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002); *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002).

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claimant underwent a pulmonary function study that produced qualifying values, the record does not contain an opinion by Dr. Campbell that addressed the cause of claimant's shortness of breath, based on a pulmonary function study.

[11]The Director asserts that Section 725.503 is not applicable because claimant was employed as a coal miner after his filing date. Contrary to the Director's assertion, Section 725.503 is applicable in this case because the administrative law judge was unable to determine the onset date of total disability from the medical opinion evidence. 20 C.F.R. §725.503. However, as discussed *infra*, the administrative law judge erred in failing to apply 20 C.F.R. §725.503 in conjunction with 30 U.S.C. §923(d). 20 C.F.R. §725.503; 30 U.S.C. §923(d).

Employer further asserts that the administrative law judge erred in ordering benefits to be paid for the period of time that claimant was still working as a miner in violation of 30 U.S.C. §923(d). The pertinent statute provides that "[n]o miner who is engaged in coal mine employment shall (except as provided in section 921(c)(3) of this title) be entitled to any benefits under this part while so employed." 30 U.S.C. §923(d). No party contests that claimant's coal mine employment ceased on February 27, 1981.[12] Director's Exhibit 4. Thus, we hold that the administrative law judge erred in ordering benefits to commence as of April 1, 1978, the month that the claim was filed. *Id*. On remand, the administrative law judge must render a determination regarding the onset date of total disability due to pneumoconiosis that is in accordance with 30 U.S.C. §923(d), if reached.

Finally, employer essentially reiterates its prior contention that liability for the payment of benefits in this case should be transferred from it to the Trust Fund because employer's due process rights were violated. Specifically, employer asserts that the administrative law judge's bias and repeated failure to reach a correct result in this case deprives it of a fair hearing. In its 2004 Decision and Order, the Board held that employer had not been denied due process in that it was timely notified of the claim, it was allowed to develop evidence, and it was allowed to participate in each phase of the adjudication. *Whitman v. Peabody Coal Co.*, BRB Nos. 03-0741 BLA and 03-0741 BLA-A, slip op. at 13-14 (July 23, 2004)(unpub.). The Board also held that employer had shown no prejudice based on the proceedings' duration. *Whitman*, BRB Nos. 03-0741 BLA and 03-0741 BLA-A, slip op. at 14. Further, the Board held that employer's speculation, that the passage of time increases the likelihood that claimant's age is the actual cause of his impairment and the incentive for a sympathy award, rather than a fair adjudication of the merits of the claim, cannot serve as the basis for releasing employer from any potential liability in this case. *Id*. Because there is no persuasive evidence that the law of the case doctrine is inapplicable, or that an exception has been demonstrated, the Board's previous disposition of this issue constitutes the law of the case. *Cale*, 861 F.2d at 947; *Brinkley*, 14 BLR at 1-150-151; *Williams*, 22 BRBS at 237; *Bridges*, 6 BLR at 1-989-990. Thus, we decline to revisit this issue.

[12]In a December 12, 1981 letter, Kathy Cates, a payroll clerk for employer's Vogue Shop, stated that claimant retired on February 27, 1981. Director's Exhibit 4.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge