

BRB Nos. 97-0949 BLA  
and 97-0949 BLA-A

GEORGE JUDE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
ELKAY MINING COMPANY	)	DATE ISSUED: _____
	)	
Employer-Petitioner	)	
Cross-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 Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Leonard Slayton, Inez, Kentucky, for claimant.

Douglas A. Smoot and Kathy L. Snyder (Jackson & Kelly), Charleston, West Virginia, for employer.

Edward Waldman (Marvin Krislov, Deputy Solicitor for National Operations; 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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order on Remand (84-BLA-1029) of Administrative Law Judge Paul H. Teitler 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). This case is before the Board for the fourth time. In a Decision and Order dated June 4, 1986, Administrative Law Judge Thomas W. Murrett found that claimant was

entitled to invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and that the evidence of record was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1)-(4). Inasmuch as Judge Murrett found that the evidence did not establish the date of onset of claimant's disability, Judge Murrett awarded benefits as the month that the claim was filed, October, 1977. Employer subsequently filed a motion for reconsideration, which Judge Murrett denied. On appeal, employer challenged Judge Murrett's findings pursuant to 20 C.F.R. §727.203(b)(2) and (b)(3) and Judge Murrett's finding that the evidence was insufficient to establish the date of onset of claimant's total disability. By Decision and Order dated March 30, 1990, the Board affirmed Judge Murrett's findings pursuant to 20 C.F.R. §727.203(b)(1)-(4). *Jude v. Elkay Mining Co.*, BRB No. 86-2833 BLA (Mar. 30, 1990)(unpublished). The Board, however, remanded the case for further consideration of the date of onset of claimant's total disability. *Id.* Employer sought reconsideration, which the Board summarily denied. Thereafter, employer filed an appeal with the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit, however, dismissed the appeal as interlocutory, and the case was remanded to the Office of Administrative Law Judges.

Due to Judge Murrett's death, the case was assigned to Administrative Law Judge Paul H. Teitler (the administrative law judge) who considered the issue of onset. The administrative law judge, based upon Dr. Zaldivar's 1982 report, found that claimant was entitled to benefits as of September, 1982. Claimant filed a motion for reconsideration, however, the administrative law judge denied claimant's request.<sup>1</sup> On appeal, employer argued that Judge Murrett erred in finding the evidence insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Employer also challenged the administrative law judge's determination regarding the date of onset. On cross-appeal, claimant also argued that administrative law judge erred in his onset determination. By Decision and Order dated July 7, 1994, the Board held that its previous affirmance of the administrative law judge's finding that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3) constituted the law of the case. *Jude v. Elkay Mining Co.*, BRB No. 93-0247 BLA/A (July 7, 1994)(unpublished). The Board, however, held that the administrative law judge erred in basing his date of entitlement finding on Dr. Zaldivar's 1982 report. *Id.* The Board, therefore, remanded the case to the administrative law judge to reconsider the date of the onset of claimant's total disability. *Id.*

On remand for the second time, the administrative law judge found, based upon Dr. Rasmussen's November 7, 1985 report, that the onset of claimant's total disability was November, 1985. On appeal, employer renewed its contention that Judge Murrett erred in finding the evidence insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). On cross-appeal, claimant argued that the administrative law judge erred in designating November, 1985 as the date of onset of total disability. By Decision and Order dated June 28, 1996, the Board revisited Judge Murrett's June 4, 1986 finding that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3).

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<sup>1</sup>The administrative law judge subsequently corrected an error identifying the Black Lung Disability Trust Fund, rather than employer, as the party liable for benefits.

*Jude v. Elkay Mining Co.*, BRB No. 95-1427 BLA/A (June 28, 1996)(unpublished). The Board acknowledged that it had not previously addressed employer's argument with respect to the adequacy of Dr. Rasmussen's opinion, and consequently, vacated Judge Murrett's finding pursuant to 20 C.F.R. §727.203(b)(3). *Id.* The Board, however, affirmed the administrative law judge's finding that the date of onset of claimant's total disability was November, 1985. *Id.*

On remand for the third time, the administrative law judge found the evidence sufficient 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 further found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding the evidence insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Claimant responds in support of the administrative law judge's finding pursuant to 20 C.F.R. §727.203(b)(3), however, in his cross-appeal, claimant argues that the administrative law judge erred in his determination regarding the date of entitlement to benefits. Employer responds that the Board's previous affirmance of the administrative law judge's April 11, 1995 finding regarding the date of entitlement constitutes the law of the case. Employer also contends that 20 C.F.R. §725.503(b) is invalid. In response to employer's response brief, the Director, Office of Workers' Compensation Programs, urges the Board to reject employer's argument that Section 725.503(b) is invalid.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Citing *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), employer first argues that Dr. Zaldivar's 1982 opinion is sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). In his September 21, 1982 report, Dr. Zaldivar found radiographic evidence of pneumoconiosis and opined that claimant suffered from a mild restrictive airway impairment due to obesity. Director's Exhibit 29. Under *Grigg*, a doctor's opinion that a miner suffers from no respiratory impairment of any kind may suffice for purposes of establishing subsection (b)(3) rebuttal. *Grigg, supra*; see also *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Inasmuch as Dr. Zaldivar's 1982 opinion includes a diagnosis of pneumoconiosis and a finding of a mild restrictive airway impairment due to obesity, this opinion does not support a finding of subsection (b)(3) rebuttal under *Grigg*.

Employer also argues that the administrative law judge erred in finding Dr. Zaldivar's 1986 opinion insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). In his April 11, 1986 report, Dr. Zaldivar found radiographic evidence of pneumoconiosis. Employer's Exhibit 2. Dr. Zaldivar, however, opined that claimant's impairment was "entirely due to [his] obesity." *Id.* The administrative law judge discredited Dr. Zaldivar's opinion because it was inconsistent with the Fourth's Circuit's holding in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). Decision and Order on Remand at 7. The administrative law judge also found that Dr. Zaldivar's 1986 opinion was not sufficiently reasoned. *Id.* at 6-7.

Employer argues that the administrative law judge erred in discrediting Dr. Zaldivar's 1986 opinion as inconsistent with the Fourth Circuit's holding in *Warth*. In *Warth*, the Fourth Circuit held that an administrative law judge should not rely on a physician's opinion that a miner does not suffer from pneumoconiosis when it is based on an assumption that obstructive disorders cannot be caused by coal mine employment. *Warth*, 60 F.3d at 174-175, 19 BLR at 2-268-269. The Fourth Circuit subsequently clarified its holding in *Warth*. Specifically, in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), the Fourth Circuit explained that administrative law judges are not precluded from relying on physicians' opinions that are not based upon the erroneous assumption that coal mine employment can never cause chronic obstructive pulmonary disease.

Unlike the physicians in *Warth*, Dr. Zaldivar, in the instant case, found that there was radiographic evidence of pneumoconiosis. Director's Exhibit 29; Employer's Exhibit 2. Moreover, Dr. Zaldivar noted in his 1982 report that pneumoconiosis can cause an obstructive impairment. Director's Exhibit 29. There is no indication that Dr. Zaldivar assumed that coal dust exposure can never cause an obstructive lung disease. Similarly, there is no indication that Dr. Zaldivar assumed that coal dust exposure can never cause a restrictive lung disease. Dr. Zaldivar provided an explanation for concluding that the miner's pulmonary impairment was due entirely to his obesity. Dr. Zaldivar specifically explained that claimant's "large abdominal girth" prevented his lungs from fully expanding. Director's Exhibit 29. Consequently, the administrative law judge erred in finding that Dr. Zaldivar's opinion was inconsistent with *Warth*.

Employer also contends that the administrative law judge failed to provide a proper basis for finding that Dr. Zaldivar's 1986 opinion was not sufficiently reasoned. We agree. Although the administrative law judge noted that Dr. Zaldivar never directly stated the extent of claimant's disability, Decision and Order on Remand at 7, Dr. Zaldivar explicitly indicated that claimant's impairment was "entirely" due to his obesity. Employer's Exhibit 2. By attributing claimant's impairment entirely to his obesity, Dr. Zaldivar effectively ruled out pneumoconiosis as a cause of claimant's impairment. Although the administrative law judge noted that Dr. Zaldivar's opinion was directly at odds with the finding by the West Virginia Occupational Pneumoconiosis Board, Decision and Order on Remand at 7, the administrative law judge failed to explain why the finding rendered by the West Virginia Occupational Pneumoconiosis Board was entitled to greater weight than that of Dr. Zaldivar. The administrative law judge also failed to explain his finding that Dr. Zaldivar's opinion was "internally inconsistent" regarding claimant's obesity.<sup>2</sup> *Id.* Inasmuch as the administrative law judge failed to provide a proper basis for discrediting Dr. Zaldivar's 1986

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<sup>2</sup>Although the administrative law judge noted that Dr. Zaldivar, in characterizing claimant's weight, referred to "moderate" obesity, he did not explain how this rendered Dr. Zaldivar's opinion internally inconsistent. Decision and Order on Remand at 7. Moreover, the administrative law judge's observation that other physicians did not comment upon claimant's weight does not undermine Dr. Zaldivar's opinion. At the time of Dr. Zaldivar's 1986 examination, claimant was noted to be five feet, ten inches tall and to weigh 265 pounds. Employer's Exhibit 2.

opinion, we remand the case to the administrative law judge to reconsider whether this opinion is sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3).<sup>3</sup>

Finally, claimant contends on cross-appeal that the administrative law judge erred in his determination regarding the date of entitlement to benefits. The Board's previous affirmance of the administrative law judge's finding that the date of onset of claimant's total disability due to pneumoconiosis was November, 1985, however, constitutes the law of the case and governs our determination herein. *See Bridges v. Director, OWCP*, 6 BLR 1-988 (1984); *Jude v. Elkay Mining Co.*, BRB No. 95-1427 BLA/A (June 28, 1996)(unpublished). Consequently, should the administrative law judge, on remand, find claimant entitled to benefits, claimant is entitled to benefits commencing as of November, 1985.

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<sup>3</sup>On remand, should the administrative law judge find the evidence sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3), claimant is precluded from establishing entitlement under 20 C.F.R. Part 410, Subpart D. *See Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985).

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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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge