BRB No. 98-1602 BLA

IRENE CANTON (Widow of BRUNO CANTON) Claimant-Petitioner v. ROCHESTER & PITTSBURGH COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED:_____ DECISION and ORDER

Appeal of the Decision and Order of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Tulowitzki & Bilonick), Ebensburg, Pennsylvania, for claimant.

Richard Davis (Arter & Hadden, LLP), Washington, D.C., for employer/carrier.

Jill M. Otte (Henry L. Solano, 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: SMITH and McGRANERY, Administrative Appeals Judges, and

NELSON, Acting Administrative Appeals Judge.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order (80-BLA-3364) of Administrative Law Judge J. Michael O'Neill 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. Initially, Administrative Law Judge Daniel Goldstein, applying the regulations at 20 C.F.R. Part 727, credited the miner with twenty-one years of coal mine employment and found the evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Judge Goldstein further found that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b).[1] Accordingly, benefits were awarded, commencing January 1, 1975.

On appeal, the Board vacated Judge Goldstein's finding of invocation pursuant to Section 727.203(a)(1) and affirmed his finding that employer failed to establish rebuttal pursuant to Section 727.203(b). *See Canton v. Rochester & Pittsburgh Coal Co.*, 8 BLR 1-475 (1986). Employer filed a Motion for Reconsideration and Rehearing *En Banc*, arguing that the Board erred in affirming Judge Goldstein's determination that employer failed to establish rebuttal. The Board granted the motion but rejected employer's arguments and affirmed its prior decision. *See Canton v. Rochester & Pittsburgh Coal Co.*, BRB No. 83-2443 BLA (June 24, 1987)(Order on Recon. *en banc*)(unpub.)(*Canton II)*.

On first remand, the case was reassigned to Administrative Law Judge Charles P. Rippey. Judge Rippey found that the miner established invocation pursuant to Section 727.203(a)(4) and that employer failed to establish rebuttal pursuant to Section 727.203(b)(2)-(4). Judge Rippey also denied employer's motion to reopen the record to allow for the submission of additional evidence to respond to changes in the law. Accordingly, benefits were again awarded.

[1]Judge Goldstein found that employer was precluded from establishing rebuttal at 20 C.F.R. §727.203(b)(1) because the miner was no longer working and at 20 C.F.R. §727.203(b)(4) because invocation was established at subsection 727.203(a)(1).

Employer appealed, and the Board vacated Judge Rippey's findings regarding Section 727.203(a)(4) invocation and the date of onset of total disability.[2] *See Canton v. Rochester & Pittsburgh Coal Co.*, BRB No. 90-1849 BLA (Nov. 27, 1992)(unpub.)(*Canton III*). Additionally, the Board rejected employer's assertion that Judge Rippey erred in denying its Motion to Reopen the Record. *Id.*

On second remand, Judge Rippey determined that the miner failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(4). Accordingly, benefits were denied.

The miner appealed, and the Board reversed Judge Rippey's Section 727.203(a)(4) finding and held that the miner established invocation pursuant to this subsection as a matter of law.[3] *See Canton v. Rochester & Pittsburgh Coal Co.*, BRB No. 94-1419 BLA (June 28, 1995)(unpub.)(*Canton IV*). The Board rejected employer's assertion that it previously erred by not requiring Judge Rippey to reopen the record so that employer could respond to changes in the law concerning rebuttal of the interim presumption. *Id.* Accordingly, the Board reversed Judge Rippey's denial of benefits and remanded the case for a determination regarding the date of entitlement. *Id.* The Board summarily denied employer's subsequent motion for reconsideration. *See Canton v. Rochester & Pittsburgh Coal Co.*, BRB No. 94-1419 BLA (Jan. 7, 1997)(Order on Recon.)(unpub.)(*Canton V*).

On third remand, this case was transferred to Administrative Law Judge J. Michael O'Neill [hereinafter, the administrative law judge]. The administrative law judge found the

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[2]The Board noted that it had previously affirmed Judge Goldstein's finding that employer failed to establish Section 727.203(b)(3) rebuttal. *See Canton v. Rochester & Pittsburgh Coal Co.*, BRB No. 90-1849 BLA (Nov. 27, 1992)(unpub.)(*Canton III*). The Board affirmed Judge Rippey's Section 727.203(b)(4) finding as unchallenged on appeal. *Id.*

[3]The Board affirmed, as unchallenged, prior determinations regarding length of coal mine employment and Section 727.203(a)(1)-(3). *See Canton v. Rochester & Pittsburgh Coal Co.*, BRB No. 94-1419 BLA (June 28, 1995)(unpub.)(*Canton IV*).

date of entitlement to be January 1980. Decision and Order at 5.

In the appeal currently pending before the Board, employer asserts that liability for this claim lies with the Black Lung Disability Trust Fund [Trust Fund] because employer has been denied its constitutional right to develop evidence to address current legal standards. Employer's Brief at 9-13. Additionally, employer asserts that the evidence is insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(4), and, therefore, the Board erred in reversing Judge Rippey's finding that invocation was not established pursuant to this subsection. Employer's Brief at 13-18. Claimant[4] responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's contention that liability for the payment of benefits should be transferred to the Trust Fund. Employer has filed a reply brief.[5]

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).

[4]Claimant is Irene Canton, widow of Bruno Canton, the miner, who filed his claim for benefits on January 9, 1975. Director's Exhibit 1. The miner died on July 29, 1992.

[5]We affirm the administrative law judge's finding regarding the date of entitlement to benefits inasmuch as it is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We first address employer's argument that it has been denied its constitutional right to develop evidence to address current legal standards. In 1983, the administrative law judge closed the record in the instant case and issued a decision awarding benefits after finding that employer had failed to establish rebuttal at Section 727.203(b)(2) in light of *Skaggs v. Cannelton Industries, Inc.*, 3 BLR 1-434 (1981), holding that even if the miner is totally disabled by non-respiratory conditions, rebuttal at subsection (b)(2) may be established by showing that claimant does not have a totally disabling respiratory impairment.[6] 1983 Decision and Order-Awarding Benefits at 8. That aspect of the administrative law judge's decision was affirmed on appeal. *Canton v. Rochester & Pittsburgh Coal Co.*, BRB No. 83-2443 BLA (Feb. 24, 1986)(unpublished). Thereafter, in 1988, the United States Court of Appeals for the Third Circuit held in *Oravitz v. Director, OWCP*, 843 F.2d 738, 740, 11 BLR 2-116, 2-120 (3d Cir. 1988) that a finding of no respiratory impairment is insufficient to establish subsection (b)(2) rebuttal. The following year the Third Circuit elaborated on this decision explaining that employer must present evidence which addresses the physical demands placed on claimant by his normal coal mine work in order to establish rebuttal pursuant to subsection (b)(2). *Gonzales v. Director, OWCP*, 869 F.2d 776, 780, 12 BLR 2-192, 2-198 (3d Cir. 1989). Employer specifically asserts that being denied the opportunity to respond to intervening case law pertaining to Section 727.203(b)(2) rebuttal, specifically *Gonzales* and *Oravitz*, has denied employer its right to due process. Employer's Brief at 9-12. Employer argues "that an employer's initial failure under a less stringent (b)(2) rebuttal standard does not eviscerate its due process right to submit new evidence addressing (b)(3) rebuttal when a new, more difficult (b)(2) rebuttal standard makes (b)(3) rebuttal more attractive." Employer's Brief at 11.

[6] 20 C.F.R §727.203 (b)(2) provides in relevant part:

> In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work....

Employer's assertion has merit. As the cases cited by employer confirm, relevant case law supports the proposition that due process and fundamental fairness mandate a reopening of the record where a significant alteration in the type of evidence necessary to meet a party's burden of proof results from a change in law. *See Peabody Coal Co. v. Ferguson*, 140 F.3d 634, 21 BLR 2-344 (6th Cir. 1998); *Peabody Coal Co. v. White*, 135 F.3d 416, 21 BLR 2-247 (6th Cir. 1998); *Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827, 21 BLR 2-1 (6th Cir., 1997); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *see also Bethenergy Mines, Inc. v. Director, OWCP, [Vrobel]* 39 F.3d 458, 19 BLR 2-95 (3d Cir. 1994*); Marx v. Director, OWCP*, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989); *cf. Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, BLR (4th Cir. 1999*).* In this case, as our concurring colleague acknowledges, a subsequent change in law relevant to Section 727.203(b)(2) rebuttal made Section 727.203(b)(3) rebuttal a more viable option for employer. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, BLR (6th Cir. 2000). Thus, the noted changes in subsection (b)(2) rebuttal do significantly alter the type of evidence necessary to meet employer's burden to establish rebuttal and compel the reopening of the record in order to ensure due process and fundamental fairness.[7] Accordingly, we vacate our previous holdings with regard to this issue, *see Church v. Eastern Associated Coal* Corp., 20 BLR 1-8 (1996); *Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993); *see also Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(2-1 opinion with Brown, J., dissenting), and remand this case to the administrative law judge for further evidentiary development.

Employer also generally asserts that the intervening case of *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988), which reversed the single-item invocation rule adopted by the United States Court of Appeals for the Third Circuit in *Revak v. National Mines Corp.*, 808 F.2d 996, 9 BLR 2-249 (3d Cir. 1986), supports its position that it was denied due process. Employer's Brief at 9-12. Pursuant to Section 727.203(a), *Mullins* imposes a stricter standard of proof on claimants by requiring them to establish invocation by a preponderance of the evidence, rather than by a

[7]This case is distinguishable from the Board's decision in *Troup v. Reading Anthracite Coal Co.*, BLR , BRB No. 98-0143 BLA (Nov. 15, 1999). In *Troup*, employer asserted that the administrative law judge erred in refusing to reopen the record in order to permit it to supplement the record in light of *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). The Board rejected employer's assertion that the administrative law judge's refusal to reopen the record constituted an abuse of discretion inasmuch as *Swarrow* imposes an increased burden on claimant, not employer, to prove a material change in conditions. To the contrary, the instant case deals with a change in law that increases *employer's* evidentiary burden or the type of evidence relevant to Section 727.203(b) rebuttal.

single piece of qualifying evidence. *See Mullins, supra*. Therefore, the burden of producing evidence to comply with this "new" standard lies with claimants rather than employers and renders employer's assertion, that it was denied due process by not being allowed to respond to *Mullins*, meritless. Accordingly, we reject employer's assertion.

Employer also asserts that the Third Circuit case of *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989), issued after Judge Goldstein's decision and the Board's first decision, supports its position that it was denied due process. Employer's Brief at 9-12. Specifically, employer asserts that *Miller* illustrates that it was denied due process when Judge Goldstein relied on Dr. Gerhart's qualifications, which were not in the record, without allowing employer an opportunity to respond. Employer's Brief at 11-12.

The Board initially held that Judge Goldstein committed only harmless error in looking outside the record to ascertain the credentials of Dr. Gerhart, and, therefore, the Board affirmed Judge Goldstein's rejection of Dr. Parcinski's opinion based on Dr. Gerhart's superior qualifications. *See Canton II, supra*. When employer raised this issue a second time, the Board rejected employer's assertion that it was substantially prejudiced because Judge Goldstein overlooked the fact that Dr. Parcinski completed a residency in internal medicine and a fellowship in pulmonary disease by stating that the physicians are not equally qualified inasmuch as Dr. Gerhart is Board-certified and Dr. Parcinski is not. *See Canton IV, supra.*

The Third Circuit court in *Miller* held that the administrative law judge in that case erred in failing to admit into the record the opinion of Dr. Altose, proffered by employer at the hearing. *See Miller, supra*. Dr. Altose critiqued a 1986 opinion of Dr. Klemens, which the administrative law judge relied on in finding entitlement. *Id.* The facts in *Miller* are very different from the facts in the present case. In *Miller*, the court found that an administrative law judge, in failing to admit evidence into the record that responded to evidence which was part of the basis for a decision adverse to employer, violated employer's due process rights. *Id.* In the present case, employer is attempting to overturn the Board's prior affirmance of Judge Goldstein's findings based on intervening case law. We reject employer's assertion inasmuch as the intervening case of *Miller* does not support employer's position that the Board erred in not finding Judge Goldstein's venture outside of the record to be substantially prejudicial inasmuch as the two physicians at issue in this case, are not equally qualified.

We next address employer's contention that the usual remedy for such a due process violation, reopening the record, is unavailable in this case in which the miner has died and no autopsy was performed. Employer's Brief at 12-13. Therefore, employer asserts that liability for this claim must be transferred to the Trust Fund because employer was previously denied an opportunity to submit evidence in its defense, citing *Venicassa v.*

Consolidation Coal Co., 137 F.3d, 197, 21 BLR 2-277 (3d Cir. 1998), and *Lane Hollow Coal Co. v. Director, OWCP, [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). Employer's Brief at 13. The Director, responding to employer's assertion, states that the Board should decline to afford the responsible operator the extraordinary relief it requests. Director's Brief at 3-4. The Director reasons that the cases relied upon by employer are unsupportive of its position inasmuch as the Third Circuit in *Venicassa* and the Sixth Circuit in *Lockhart* allowed for a transfer of liability to the Trust Fund under completely different circumstances. Director's Brief at 2-4. In these two cases, transfer of liability was warranted because the Department of Labor's failure to timely notify the appropriate employer of its potential liability denied it of an opportunity to mount a meaningful defense. *Id.*

Conversely, in this case employer was promptly notified of its potential liability after DOL made an initial finding of entitlement in June 1979. Director's Exhibit 20. Thereafter, employer controverted the claim and proceeded to defend its interests, submitting a complete pulmonary evaluation of the miner performed by Dr. Parcinski. Director's Exhibits 21, 24. Thus, the facts of the present case, unlike those in *Venicassa* and *Lockhart*, do not provide persuasive support for employer's request to transfer liability to the Trust Fund. Furthermore, contrary to employer's assertion, the miner's death does not preclude it from developing further evidence regarding Section 727.203(b)(3) rebuttal in the form of an independent review of the medical evidence in the record. Accordingly, we deny employer's transfer request.

Employer further contends that the Board erred in reversing Judge Rippey's finding that invocation was not established pursuant to Section 727.203(a)(4). Employer's Brief at 13-18. Judge Rippey found the opinions of Drs. Gerhart and Mangrola, supporting Section 727.203(a)(4) invocation, to be credible and found Dr. Parcinski's contrary opinion to be reasoned as well. However, Judge Rippey found the medical opinions failed to support invocation, without discrediting any of them. Judge Rippey's reasoning for not discrediting any of these opinions, even though they were contradictory, was that the miner could have been suffering from a pulmonary impairment due to a condition other than pneumoconiosis, as indicated by the earlier opinions in the record, which later improved to the point that there was no impairment, as indicated by the later opinion of Dr. Parcinski.

In 1995, the Board stated that Judge Rippey's finding of no Section 727.203(a)(4) invocation was improper for the following reasons. *See Canton IV, supra*. First, the Board held that Judge Rippey, in his analysis, substituted his opinion for that of the medical experts inasmuch as both Drs. Gerhart and Mangrola opined that the miner had a respiratory condition arising out of his coal mine employment. *Id.* Second, the Board held that Judge Rippey erred in noting that Dr. Parcinski's opinion is not entirely supported by the objective evidence, but nonetheless crediting his opinion as reasoned without reconciling the discrepancy between this physician's conclusions and his qualifying blood gas results obtained during his examination. *Id.* The Board also noted that it had held previously that Dr. Parcinski's opinion is entitled to less probative weight on the issue of disability because he has lesser qualifications. The Board then reversed Judge Rippey's finding of no Section 727.203(a)(4) invocation inasmuch as Judge Rippey permissibly found the opinions of Drs. Gerhart and Mangrola to be reasoned and these opinions are uncontradicted with the exclusion of Dr. Parcinski's opinion. *Id.*

In reversing Judge Rippey's finding that the evidence did not establish subsection 727.203(a)(4) invocation, employer asserts that the Board exceeded it scope of review, that its finding has no evidentiary support, and is improper as a matter of law. Employer's Brief at 13-18. In doing so, employer essentially raises the same contentions that it raised in its 1995 Motion for Reconsideration, which the Board denied, *see Canton V, supra*. Therefore, inasmuch as employer has not advanced any new arguments in support of altering the Board's previous holding and has not set forth any exception to the law of the case doctrine, *i.e.*, there was no change in the underlying fact situation, no intervening controlling authority demonstrates that the initial decision was erroneous, and the Board's initial decision was neither clearly erroneous nor a manifest injustice, *see Church, supra*; *Coleman, supra*; *see also Williams, supra*, we adhere to our previous reversal of Judge Rippey's Section 727.203(a)(4) finding.

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated and the case is remanded to the administrative law judge for further evidentiary development and for reconsideration of rebuttal pursuant to 20 C.F.R § 727.203(b)(3).

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

NELSON, Acting Administrative Appeals Judge, concurring:

I concur with the decision of my colleagues to vacate and remand the Decision and Order of the administrative law judge awarding benefits. However, while I agree that on the facts of this case, because of the changes in the law at Section 727.203(b)(2), employer should be afforded an opportunity to develop additional evidence at Section 727.203(b)(3), my reasons for this determination differ from those of my colleagues.

Citing *Marx v. Director, OWCP*, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989), employer contends that it "should at least have an opportunity to introduce evidence which satisfies [the new] standard[s]." In *Marx,* the court addressed the interpretation of 20 C.F.R. Section 718.303, and specifically whether to interpret Section 718.303 in the same manner as 20 C.F.R. Section 410.462. Both sections provide a rebuttable presumption of death due to pneumoconiosis where a miner was employed for at least ten years in the mines and died of a respirable disease. However, Section 718.303 does not contain a provision similar to the limitation found in the second sentence of Section 410.462(b).

In remanding *Marx*, the court recognized that *Tackett v. Benefits Review Board*, 806 F.2d 640 (6th Cir. 1986), and *Hunter v. Director, OWCP*, 803 F.2d 800 (4th Cir. 1986), two cases decided after the administrative hearing in *Marx*, altered the approach at Section 410.462 for establishing a reasonable possibility that death was due to pneumoconiosis.

While not deciding whether Section 718.303 was to be given the same interpretation as Section 410.462, the court remanded *Marx* because "[s]ince it is far less clear that the requirement [of Section 410.462] is even applicable to claims governed by §718.303, it would be unfair to hold that Ms. Marx's failure to introduce such evidence could be fatal to her cause when her conduct comported with prior administrative practice under §410.462."

At issue in the instant case is whether additional evidence should be developed at Section 727.203(b)(3) because of a change in law at Section 727.203(b)(2). Subsections (b)(2) and (b)(3) are not similarly worded provisions, as was the case in *Marx.* Moreover, there is no assertion of a change in law, nor of a change in the interpretation of subsection (b)(3). Therefore, I do not believe that *Marx* is on point.

What is on point, is the decision of the Sixth Circuit in *Peabody Coal Co. v. White*, 135 F.3d 416, 21 BLR 2-247 (6th Cir. 1998) in which the court held that an "employer's initial failure under a less stringent (b)(2) rebuttal standard does not eviscerate [employer's] due process right to submit new evidence addressing (b)(3) rebuttal when a new, more difficult (b)(2) rebuttal standard makes (b)(3) rebuttal more attractive." Recently, the Sixth Circuit further clarified this issue in *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, BLR (6th Cir. 2000). In *Holdman*, the court stated:

> Island Creek also cites the decision in York v. Benefits Review Bd., 819 F.2d 134 (6th Cir.1987), which changed the standard for §727.203(b)(2) rebuttal. Island Creek contends that the York decision also changed the standard for §727.203(b)(3) rebuttal. This is incorrect. *See Peabody Coal Co. v. White*, 135 F.3d 416,419 (6th Cir.1998). Also Island Creek contends that, because the (b)(2) standard changed, it may introduce new evidence in its (b)(3) challenge. We permit such evidence only if the formerly-lax (b)(2) standard lulled employers into attempting primarily to rebut the presumption via (b)(2). *See Island Creek Coal Co. v. Hammonds*, No. 94-4110, 1996 WL 135019, at *4 (6th Cir. Mar. 25, 1996) (unpublished) (denying remand where Island Creek did not ignore (b)(3) to focus on (b)(2)). Here, ALJ Rippey twice emphasized that Island Creek focused "primarily" on (b)(3). Therefore, (b)(2)'s formerly-lax standard did not "lull" Island Creek into focusing its efforts on (b)(2) rebuttal to the detriment of its case for (b)(3) rebuttal.

Holdman, *supra* at 881, , n.4.

Thus, the Sixth Circuit has made it clear that it is not the mere change in law at subsection (b)(2) that compels the opportunity to develop additional evidence at subsection (b)(3). Rather, this opportunity arises only when one has been "lulled" into a reliance on subsection (b)(2) to the detriment of subsection (b)(3). On the whole, the evidence in this

case supports the conclusion that employer was "lulled" into a reliance on subsection (b)(2) to the detriment of subsection (b)(3).

Form CM 1025, filed prior to the hearing in 1981, indicates that employer contested both issue 7 (total disability) and issue 9 (causation). *See* Director's Exhibit 26. Moreover, at the hearing, Judge Goldstein confirmed that issue 9 (causation) was still in contention. *See* Hearing Transcript, June 16, 1981, page 5. Nevertheless, in employer's closing statement which was submitted by separate letter, the only rebuttal issue raised by employer is subsection (b)(2). *See* Defendant Employer's Closing Statement, page 8.

An unrelated change in law should not be used as an excuse for a second bite at the apple. However, as noted above, it has been recognized that the former interpretation of subsection (b)(2) "lulled" some parties into a reliance on this subsection, to the detriment of subsection (b)(3). In the instant case, the evidence indicates that employer ultimately focused its rebuttal arguments solely at subsection (b)(2). Consequently, in this circumstance, employer is entitled to a remand in order to develop additional evidence addressing subsection (b)(3) rebuttal.

In light of the foregoing, I concur.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge