BRB No. 00-0127 BLA

CARL WHITE	)	
	)	
Claimant-Respondent	)	
	)	DATE ISSUED:
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

John E. Anderson (Cole, Cole & Anderson), Barbourville, Kentucky, for claimant.

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

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (81-BLA-7666) of Administrative Law Judge Donald W. Mosser with respect to 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 is the fourth time that this case has been before the Board. In its prior Decision and Order, the Board affirmed Administrative Law Judge C. Richard Avery's finding that employer failed to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2) and (b)(3) and his decision to reject employer's request to reopen the record. *White v. Peabody Coal Co.*, BRB No. 92-2419 BLA (Feb. 23, 1994)(unpub.). Employer sought review of the Board's Decision and Order by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises.[1] The court affirmed Judge Avery's determination under Section 727.203(b)(2), but held that in light of the adoption of a new legal standard pertinent to Section 727.203(b)(2), which affected employer's rebuttal strategy, the administrative law judge should have given employer the opportunity to obtain new evidence relevant to Section 727.203(b)(3). *Peabody Coal Co. v. White*, 135 F.3d 416, 21 BLR 2-247 (6th Cir. 1998). Accordingly, the case was remanded for this purpose.

On remand, the case was assigned to Administrative Law Judge Donald W. Mosser (the administrative law judge) for decision.[2] The administrative law

[1]The present case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's last year of coal mine employment occurred in the Commonwealth of Kentucky. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[2]The parties did not object to the reassignment of the case to Judge Mosser.

judge found that the evidence of record as a whole was insufficient to establish rebuttal pursuant to Section 727.203(b)(3). Accordingly, benefits were awarded. Employer argues on appeal that the administrative law judge did not properly weigh the medical opinion evidence under Section 727.203(b)(3). Claimant has responded and urges affirmance of the award of benefits.[3] The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

The United States Court of Appeals for the Sixth Circuit has held that in order to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3), the party opposing entitlement must affirmatively prove that pneumoconiosis was not a contributing cause of the miner's total disability. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984); *see also Warman v. Pittsburg & Midway Coal Co.*, 839 F.2d 259, 11 BLR 2-62 (6th Cir. 1988); *Roberts v. Benefits Review Board*, 822 F.2d 636, 10 BLR 2-153 (6th Cir. 1987). In the present case, the administrative law judge determined that the opinions of Drs. Fino and Broudy, employer's medical experts, failed to sufficiently rule out pneumoconiosis or coal dust exposure as a source of claimant's total disability. Decision and Order at 8.

Contrary to employer's contention, the administrative law judge rationally found that Dr. Broudy's opinion was entitled to little weight under Section 727.203(b)(3), as Dr. Broudy relied, in part, upon the absence of x-ray evidence of the disease in concluding that pneumoconiosis played no role in the miner's disability; a finding contrary to the determination made under Section 727.203(a)(1). *Id*.; Employer's Exhibit 8; *see Tussey v. Island Creek Coal Co*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). The administrative law judge also acted within his discretion in according diminished weight to Dr. Fino's opinion on the ground that he relied, in

[3]Claimant, Carl White, died on March 22, 2000, while the present appeal was pending before the Board. His widow, Loretta White, is continuing to pursue his claim on his behalf.

part, upon the fact that claimant's pulmonary function studies revealed an obstructive impairment, which Dr. Fino stated is not consistent with pneumoconiosis, but did not comment upon the pulmonary function study evidence which indicated that claimant had a restrictive impairment, which Dr. Fino stated is supportive of a diagnosis of pneumoconiosis. *Id*.; Employer's Exhibits 7, 9, 10, 12; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

We affirm, therefore, the administrative law judge's determination that employer did not proffer evidence sufficient to affirmatively establish that pneumoconiosis is not a contributing cause of claimant's total disability pursuant to Section 727.203(b)(3). Thus, error, if any, in the administrative law judge's assessment of the contrary opinions of Drs. Boggess, Glassford, Traughber, Penman, and Bailey is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). In light of our affirmance of the administrative law judge's finding under Section 727.203(b)(3) and our prior affirmance of Judge Avery's findings that employer cannot establish rebuttal of the interim presumption under Section 727.203(b)(1), (b)(2), and (b)(4), we must also affirm the award of benefits under Part 727.

Accordingly, the administrative law judge's is Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge