BRB No. 99-1299 BLA

ALTON W. HOOD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
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 - Awarding Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Harry L. Matheson (King, Deep & Branaman), Henderson, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

Edward Waldman (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.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (99-BLA-0210) 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 third time that this case has been before the Board. Claimant filed an application for benefits on June 21, 1979. Director's Exhibit 1. In a Decision and Order issued on April 11, 1984, Administrative Law Judge Daniel L. Leland credited claimant with twenty-six years of coal mine employment and considered the claim pursuant to the regulations set forth in Part 727. Judge Leland determined that claimant did not establish invocation of the interim presumption under 20 C.F.R. §727.203(a)(2)-(4). With respect to 20 C.F.R. §727.203(a)(1), Judge Leland applied the true doubt rule to find that the x-ray evidence was sufficient to establish invocation. Judge Leland further determined, however, that employer rebutted the interim presumption pursuant to 20 C.F.R. §727.203(b)(2). Accordingly, benefits were denied. Judge Leland also rejected claimant's subsequent Motion for Reconsideration in a Supplemental Decision and Order dated June 1, 1984.

Claimant filed an appeal with the Board. In a Decision and Order issued on August 19, 1993, the Board vacated Judge Leland's finding under Section 727.203(b)(2) and remanded the case for reconsideration of rebuttal under Section 727.203(b)(2) and (b)(3). *Hood v. Peabody Coal Co.*, BRB No. 92-1046 BLA (Aug. 19, 1993)(unpub.). Judge Leland determined on remand that the evidence of record was insufficient to establish rebuttal pursuant to Section

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[1]The long gap between the issuance of Judge Leland's Order denying claimant's Motion for Reconsideration and the Board's Decision and Order initially occurred as a result of the fact that Judge Leland's Order was not served upon the attorney representing claimant until December 17, 1986. Counsel filed a Notice of Appeal on behalf of claimant on January 13, 1987, which the Board did not receive. In response to claimant's inquiry in October of 1991, the Board issued an Order in which it accepted claimant's appeal as timely filed pursuant to 20 C.F.R. §802.207(a)(2). *Hood v. Peabody Coal Co.*, BRB No. 92-1046 BLA (Oct. 16, 1992)(unpub. Order).

727.203(b)(2) and (b)(3). Accordingly, benefits were awarded. Employer appealed to the Board which, in a Decision and Order dated February 23, 1995, affirmed Judge Leland's findings under Section 727.203(b)(2) and (b)(3), but vacated his initial finding of invocation under Section 727.203(a)(1) in light of the Supreme Court's invalidation of the true doubt rule in *Director, OWCP v. Greenwich Collieries [Ondecko],* 114 S.Ct. 2251, 18 BLR 2A-1 (1994). Thus, the Board remanded the case for reconsideration of invocation pursuant to Section 727.203(a)(1). *Hood v. Peabody Coal Co.*, BRB No. 94-0603 BLA (Feb. 23, 1995)(unpub.). Employer filed a Motion for Reconsideration which the Board summarily denied. *Hood v. Peabody Coal Co.*, BRB No. 94-0603 BLA (Dec. 19, 1996)(unpub. Order).

When the case was returned to him, Judge Leland issued an Order remanding the claim to the district director for the development of additional x-ray evidence inasmuch as the most recent films were approximately seventeen years old. While the parties submitted additional evidence before the district director, the Board disposed of employer's second Motion for Reconsideration by granting employer's request for relief and instructing the administrative law judge to allow the parties to submit evidence relevant to rebuttal under Section 727.203(b)(2) and (b)(3). *Hood v. Peabody Coal Co.*, BRB No. 94-0603 BLA (Dec. 18, 1997)(unpub.). Judge Leland remanded the claim to the district director once again.

Upon claimant's request, the case was transferred to the Office of Administrative Law Judges for a hearing and was assigned to Administrative Law Judge Donald W. Mosser (the administrative law judge). After conducting a formal hearing, the administrative law judge issued the Decision and Order that is the subject of the present appeal. The administrative law judge found that claimant established invocation under Section 727.203(a)(1) and that employer failed to establish rebuttal under Section 727.203(b)(2) and (b)(3). Accordingly, benefits were awarded effective June 1, 1979 - the first day of the month in which claimant filed his Part 727 claim. Employer argues on appeal that the administrative law judge findings regarding Sections 727.203(a)(1), 727.203(b)(2) and (b)(3), and the date of onset of total disability due to pneumoconiosis are in error. Employer also maintains that liability for the payment of benefits should be transferred to the Black Lung Disability Trust Fund (Trust Fund), since the delays in the processing of the case deprived employer of its right to have claimant examined by a physician of its choosing. Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Workers'

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

Compensation Programs, has also responded and urges the Board to reject employer's arguments concerning transfer of liability to the Trust Fund and the validity of the regulation pertaining to the date from which benefits are payable.

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).

Turning first to employer's contentions regarding the administrative law judge's findings on the merits, pursuant to Section 727.203(a)(1), the administrative law judge considered the x-ray evidence of record and determined that it was sufficient to establish the existence of pneumoconiosis and invocation of the interim presumption. Decision and Order at 7. The administrative law judge accorded greater weight to the more recent films and to the interpretations offered by "the most highly qualified readers," stating that "four found pneumoconiosis while three did not." *Id.*; Director's Exhibit 34. The administrative law judge concluded, therefore, based upon the interpretations of Drs. Westerfield, Sargent, and Whitehead, that "under the ILO classification system, the preponderance of the evidence favors a finding of pneumoconiosis." Decision and Order at 8.

Employer argues that the administrative law judge erred in ignoring the significance of the written comments in which Drs. Sargent, Westerfield, Fino, and Branscomb indicated that the opacities viewed on claimant's x-rays are not diagnostic of coal workers' pneumoconiosis. Employer also asserts that the administrative law judge did not provide the criteria governing his identification of "the most highly qualified" readers and miscounted the number of positive readings by the physicians so designated. Employer further maintains that the administrative law judge substituted his opinion for that of a medical expert when he stated that x-ray diagnoses of interstitial fibrosis are not inconsistent with a diagnosis of pneumoconiosis.

Employer's contentions have merit. Dr. Sargent, a Board-certified radiologist and B reader, classified the x-ray dated May 29, 1997 as 2/2 and the films dated
September 9, 1997 and September 16, 1997 as 2/1, but commented that the opacities observed did not represent coal workers' pneumoconiosis. Director's Exhibit 34. Dr. Westerfield, a B reader, classified the August 19, 1997 and September 16, 1997 films as 2/2, but suggested that the opacities supported a diagnosis of pulmonary fibrosis rather than coal workers' pneumoconiosis and that other processes should be considered. *Id.* Drs. Fino and Branscomb did not

read any films, but reviewed the interpretations of record and concluded that the films categorized as positive under the ILO-U/C system were not diagnostic of coal workers' pneumoconiosis. Employer's Exhibits 2, 4. Although the administrative law judge acknowledged that Dr. Sargent was "skeptical" of a diagnosis of coal workers' pneumoconiosis based on the x-rays he viewed, he did not treat Dr. Sargent's statements as evidence probative of the existence of pneumoconiosis nor did he address Dr. Westerfield's comments or the opinions of Drs. Fino and Branscomb.

Inasmuch as an administrative law judge is required to consider all relevant evidence in determining whether a claimant has established entitlement to benefits under the Act, we cannot affirm the administrative law judge's finding under Section 727.203(a)(1). *See* Administrative Procedure Act (APA), 5 U.S.C. §554, *et seq*., as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 108 S.Ct. 427, 435 n. 26, 11 BLR 2-1, 2-9 n. 26 (1987), *reh'g denied* 108 S.Ct. 787 (1988). Thus, the administrative law judge's finding of invocation is vacated and the case is remanded to the administrative law judge for reconsideration of the x-ray evidence pursuant to Section 727.203(a)(1) in light of the opinions of Drs. Sargent, Westerfield, Branscomb, and Fino regarding the significance of the opacities viewed on the most recent x-rays. On remand, the administrative law judge must also identify the criteria underlying his designation of the "most highly qualified readers" and identify with specificity the evidence which provides the basis for his tally of the positive and negative x-ray interpretations of record. Lastly, the administrative law judge cannot rely upon his own opinion regarding the link between pneumoconiosis and interstitial fibrosis, but rather must refer to medical evidence in support of this conclusion. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

With respect to the administrative law judge's determination that employer failed to establish rebuttal pursuant to Section 727.203(b)(2), employer argues that the administrative law judge erred in finding that the medical evidence of record does not support a determination that claimant is capable of performing his usual coal mine work or comparable and gainful work. We disagree. The administrative law judge rationally determined that although several physicians opined that claimant is not disabled from a respiratory or pulmonary standpoint, none of the physicians of record opined that claimant is not totally disabled due to another cause as is required in order to establish subsection (b)(2) rebuttal in this claim arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Decision and Order at 13; *see York v. Benefits Review Board*, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987).

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[3]The present case arises within the jurisdiction of the United States Court

Under Section 727.203(b)(3), the administrative law judge considered the medical opinions of Drs. Simpao, Fino, Houser, and Branscomb and accorded greater weight to Dr. Simpao's diagnosis of total disability due to pneumoconiosis, based upon his status as claimant's treating physician. The administrative law judge also stated that the stage of claimant's pneumoconiosis and his long history of coal mine employment supported Dr. Simpao's diagnosis. He concluded, therefore, that employer failed to establish rebuttal under Section 727.203(b)(3). Decision and Order at 14-15. Employer asserts that the administrative law judge erred in according greater weight to Dr. Simpao's opinion and in discrediting the opinions of Drs. Fino, Houser, and Branscomb. Employer also maintains that in referring to the length of claimant's coal mine employment and the number of opacities viewed on claimant's chest films, the administrative law judge substituted his opinion for that of a medical expert.

With respect to Section 727.203(b)(3) rebuttal, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the party opposing entitlement must affirmatively establish that pneumoconiosis is not a contributing cause of the miner's disability. *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). Contrary to employer's assertion, under this standard, a physician's finding that the miner does not have a respiratory or pulmonary impairment is insufficient to establish rebuttal, as it leaves open the possibility that pneumoconiosis or coal dust exposure is a contributing cause of the miner's presumed total disability. *See Warman*, *supra*. In the present case, the administrative law judge rationally determined that because Drs. Fino and Houser rendered their conclusions in terms of the absence of a respiratory or pulmonary impairment, their opinions did not support a finding of rebuttal under Section 727.203(b)(3). Decision and Order at 14; Director's Exhibit 34; Employer's Exhibit 4.

Regarding Dr. Branscomb's report, the administrative law judge indicated that it was supportive of rebuttal but gave it less weight than Dr. Simpao's opinion on the ground that Dr. Branscomb based his conclusions on nonqualifying objective tests, which are not relevant to the etiology of claimant's presumed total disability, and upon his "feeling" that claimant does not have pneumoconiosis,

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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*).

which contradicted the administrative law judge's finding pursuant to Section 727.203(a)(1). The administrative law judge also stated that Dr. Branscomb's opinion ruling out claimant's extensive coal mine work as a cause of the his disability is not well reasoned. Decision and Order at 14-15; Employer's Exhibit 2. The administrative law judge acted within his discretion in discounting the portion of Dr. Branscomb's opinion relating to the absence of a respiratory or pulmonary impairment, *see Warman*, *supra*, and in finding that the remaining portion of Dr. Branscomb's opinion ruling out pneumoconiosis or coal dust exposure as a contributing cause of disability is not adequately reasoned. *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). Dr. Branscomb set forth the latter conclusion but did not identify the underlying rationale other than the absence of any coal dust related respiratory or pulmonary impairment. 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. Thus, error, if any, in the administrative law judge's assessment of Dr. Simpao's opinion is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

With respect to the administrative law judge's finding that claimant is entitled to benefits commencing on June 1, 1979 - the month in which he filed his claim, employer contends that the administrative law judge's finding does not comport with the APA and is not supported by substantial evidence. Decision and Order at 15. Employer's contentions have merit, as the administrative law judge provided no explanation of his finding nor did he consider whether uncontradicted medical evidence establishes that claimant was not totally disabled due to pneumoconiosis at some point subsequent to the date on which he filed his claim, despite the administrative law judge's indication that the x-ray evidence of record dated prior to 1997 is not positive for pneumoconiosis. 20 C.F.R. §§725.503(b), 727.302; *see Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *see also Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). We vacate, therefore, the administrative law judge's finding regarding the date of onset of total disability due to pneumoconiosis. The administrative law judge must reconsider this issue on remand if he finds that claimant is entitled to benefits under 20 C.F.R. Part 727. Inasmuch as we concur with employer's contention that the administrative law judge did not properly assess the evidence under 20 C.F.R. §725.503(b), we decline to reach employer's argument regarding the validity of this regulation.

Finally, employer contends that liability for the payment of benefits must be transferred to the Trust Fund, as delays in the processing of the case precluded employer's from having claimant examined by a physician of its own choosing. Very shortly after the Board remanded the case in 1997 to allow the parties to develop evidence relevant to the Sixth Circuit's new rebuttal standards, claimant was placed in a nursing home and was unable to participate in a pulmonary evaluation. The Director maintains, *inter alia*, that employer's allegation is not properly before the Board, as employer did not raise it before Judge Mosser at the hearing conducted on March 4, 1999 or in its post-hearing brief dated May 3, 1999. We concur with the Director's assertion that employer waived its due process argument because it was not raised before an administrative law judge at the earliest opportunity. *See generally Dankle v. Duquesne Light Company*, 20 BLR 1-1 (1995); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986); *Prater v. Director, OWCP*, 8 BLR 1-461 (1986). Consequently, we will not address employer's contentions regarding transfer of liability to the Trust Fund.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed in part and vacated in part and is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge