BRB No. 99-1301 BLA

HAROLD GREER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (82-BLA-5098) of Administrative Law Judge Donald W. Mosser denying 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 third time. In the original Decision and Order, Administrative Law Judge Joan Huddy Rosenzweig credited claimant with twenty-five years and three months of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 727. Judge Rosenzweig found the evidence sufficient to establish invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1). Although Judge Rosenzweig found the evidence insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(1), (b)(3) and (b)(4), she found the evidence sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2). Judge Rosenzweig also found that claimant was not entitled to benefits under 20 C.F.R. Part 410, Subpart D. Accordingly, Judge Rosenzweig denied benefits. In response to claimant's appeal, the Board affirmed Judge Rosenzweig's findings at 20 C.F.R. §§727.203(a)(1) and 727.203(b)(1), (b)(3) and (b)(4). However, in view of the new subsection (b)(2) rebuttal standard enunciated by the United States Court of Appeals for the Sixth Circuit in *York v. Benefits Review Board*, 819 F.2d 134, 19 BLR 2-99 (6th Cir. 1987), the Board vacated Judge Rosenzweig's finding at 20 C.F.R. §727.203(b)(2), and remanded the case for further consideration. The Board instructed Judge Rosenzweig to consider entitlement to benefits at 20 C.F.R. §410.490 if she found that claimant was not entitled to benefits under 20 C.F.R. Part 727. *Greer v. Peabody Coal Co.*, BRB No. 85-1393 BLA (Jan. 29, 1988)(unpub.). The Board subsequently granted employer's request for reconsideration and granted in part, but denied in part, the relief requested. *Greer v. Peabody Coal Co.*, BRB No. 85-1393 BLA (May 23, 1988)(unpub.).

On the first remand, Judge Rosenzweig found the evidence insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(2). Accordingly, Judge Rosenzweig awarded benefits. In disposing of employer's appeal, the Board affirmed Judge Rosenzweig's finding at 20 C.F.R.

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[1]In its Decision and Order on Reconsideration, the Board held that it was proper for it to raise the issue of rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(2) *sua sponte*, and to remand the case for consideration under the new standard enunciated by the United States Court of Appeals for the Sixth Circuit in *York v. Benefits Review Board*, 819 F.2d 134, 19 BLR 2-99 (6th Cir. 1987). The Board also held that it will not disturb Administrative Law Judge Joan Huddy Rosenzweig's finding that employer failed to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). Lastly, the Board vacated its order to Judge Rosenzweig that she must consider entitlement to benefits pursuant to 20 C.F.R. §410.490 on remand. *Greer v. Peabody Coal Co.*, BRB No. 85-1393 BLA (May 23, 1988)(unpub.).

§727.203(b)(2). The Board also affirmed Judge Rosenzweig's decision not to reopen the record on remand. *Greer v. Peabody Coal Co.*, BRB No. 90-2057 BLA (Oct. 16, 1992)(unpub.). However, following employer's appeal of the Board's Decision and Order, the Sixth Circuit reversed the Board's holding that employer waived its right to argue that Judge Rosenzweig must rehear the case, and remanded the case for a new trial. *See Peabody Coal Co. v. Greer*, 62 F.3d 801, 19 BLR 2-235 (6th Cir. 1995).

On the most recent remand, the case was reassigned to Administrative Law Judge Donald W. Mosser (the administrative law judge), who found the evidence insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(2), but found the evidence sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Consequently, the administrative law judge found that claimant is not entitled to benefits under 20 C.F.R. Part 727. In addition, although the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1) and 718.203(b), he found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1)-(4). Hence, the administrative law judge found that claimant is not entitled to benefits under 20 C.F.R. Part 718. Accordingly, the alj denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to consider whether the most recent pulmonary function study dated February 24, 1998, which was administered by Dr. Selby, is sufficient to establish invocation of the interim presumption of total disability due to pneumoconiosis at 20 C.F.R. §727.203(a)(2). Claimant also challenges the administrative law judge's finding that the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). Further, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Employer responds, urging affirmance of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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[2]The Board also held that its prior decision to affirm Judge Rosenzweig's finding at 20 C.F.R. §727.203(b)(3) constituted the law of the case. *Greer v. Peabody Coal Co.*, BRB No. 90-2057 BLA, slip op. at 4 (Oct. 16, 1992)(unpub.).

[3]Inasmuch as the findings at 20 C.F.R. §727.203(b)(2) and 20 C.F.R. §§718.202(a)(1), 718.203(b) and 718.204(c)(1)-(3) of Administrative Law Judge Donald W. Mosser (the administrative law judge) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Initially, we reject claimant's contention that the administrative law judge erred in failing to consider whether the newly submitted pulmonary function study evidence is sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(2) since Judge Rosenzweig's finding that the evidence is sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1) is the law of the case. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989). The Sixth Circuit did not remand the case to the administrative law judge to consider invocation of the interim presumption at 20 C.F.R. §727.203(a)(2). Rather, the Sixth Circuit remanded the case to the administrative law judge for a new trial with respect to the issue of rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) in light of its subsection (b)(2) rebuttal standard enunciated in *York*. Moreover, a finding of invocation of the interim presumption at 20 C.F.R. §727.203(a)(2) does not preclude a finding of rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). Thus, having established invocation of the interim presumption at 20 C.F.R. §727.203(a)(1), there is no need to consider whether the evidence is sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(2).

Claimant next contends that the administrative law judge erred in finding the evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). The administrative law judge stated, "[h]aving carefully reviewed the relevant evidence, I agree that the opinions of Drs. West, Traughber and Calhoun weigh against [subsection] (b)(3) rebuttal." Decision and Order on

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[4]The administrative law judge stated that "Dr. Dodds's opinion supports a finding of pneumoconiosis but fails to address disability at all." Decision and Order on Remand at 11. Dr. Dodds diagnosed obstructive lung disease related to coal mining. Claimant's Exhibit 14.

[5]Dr. Calhoun diagnosed coal workers' pneumoconiosis and opined that claimant is totally disabled for any and all types of work. Claimant's Exhibit 4. Dr. West opined that claimant is disabled because of shortness of breath which results primarily from coal workers' pneumoconiosis. Claimant's Exhibit 5. Dr. Traughber diagnosed coal workers' pneumoconiosis and opined that claimant's disability is both pulmonary and cardiac. Claimant's Exhibit 7; Director's Exhibit 9.

Remand at 10. The administrative law judge also stated, "[o]n the other hand, I believe that Dr. Getty's opinion, in addition to those of Drs. Anderson and Gallo, weighs in favor of [subsection (b)(3)] rebuttal." *Id*. Additionally, the administrative law judge stated, "[o]f particular importance, however, the newly submitted opinions [of Drs. Fino and Selby] support [subsection (b)(3)] rebuttal." *Id*.

In *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985), and *Warman v. Pittsburg & Midway Coal Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988), the Sixth Circuit held that the medical opinion evidence must establish that pneumoconiosis played no part in the miner's total disability. Further, in *Warman*, the Sixth Circuit held that a finding of no functional disability arising out of coal mine employment is

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[6]The administrative law judge stated that "Dr. Getty's opinion is well-documented and worthy of weight." Decision and Order on Remand at 11. However, the administrative law judge did not accord greater weight to Dr. Getty's opinion than to the contrary opinions of record.

[7]Dr. Anderson, in a medical report dated February 12, 1982, diagnosed category 1 pneumoconiosis and arteriosclerotic heart disease, and opined that "[u]nder the AMA's guide to permanent impairment, [claimant's] pulmonary classification would be class 2 (10%-20%)." Claimant's Exhibit 10. In a subsequent deposition dated July 13, 1984, Dr. Anderson diagnosed category 1 pneumoconiosis and arteriosclerotic heart disease. Employer's Exhibit 7. Further, Dr. Anderson opined that "under the new [AMA] guides [claimant] would have 0% impairment." *Id*. (Dr. Anderson's Deposition at 38). In a deposition dated June 18, 1982, Dr. Gallo opined that the primary tool used in determining that claimant does not suffer from coal workers' pneumoconiosis was a chest x-ray film. Employer's Exhibit 3 (Dr. Anderson's Deposition at 22). Additionally, Dr. Gallo opined that claimant would be able to perform heavy work. *Id*. (Dr. Anderson's Deposition at 20).

[8]Dr. Fino, in a medical report dated March 1, 1999, opined that claimant neither suffers from coal workers' pneumoconiosis nor has a respiratory impairment present. Employer's Exhibit 14. In a medical report dated February 24, 1998, Dr. Selby opined that claimant does not suffer from coal workers' pneumoconiosis, and stated that "[i]f [claimant] had never stepped foot in a coal mine he would still have the same respiratory and pulmonary capacity as he has today." Employer's Exhibit 8. Further, Dr. Selby stated that "[i]f [claimant] had never smoked cigarettes, he would have normal respiratory and pulmonary functions, as this is the entire cause of any respiratory abnormality he may have, unless he has also had occult pulmonary emboli associated with his phlebitis." *Id*.

insufficient to support a finding of rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3).

The administrative law judge properly accorded greater weight to the opinion of Dr. Fino than to the contrary opinions of Drs. Calhoun, West and Traughber because of Dr. Fino's superior qualifications. *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge also properly accorded greater weight to the opinions of Drs. Fino and Selby than to the contrary opinions of Drs. Calhoun, West and Traughber because he found them to be better reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In addition, the administrative law judge properly accorded greater weight to the opinion of Dr. Selby because he

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[9]Although the record indicates that Dr. Traughber is Board-certified in internal medicine, Claimant's Exhibit 7, the record also indicates that Dr. Fino is Board-certified in internal medicine and pulmonary disease, Employer's Exhibit 14. Further, the record indicates that Dr. Selby is Board-certified in pulmonary disease. Employer's Exhibit 8. The record does not contain the credentials of Drs. Calhoun and West.

[10]The administrative law judge observed that "Dr. Calhoun was the miner's treating physician in 1980 and was in a position to be well acquainted with his physical condition." Decision and Order on Remand at 10. In addition, the administrative law judge observed that Dr. Calhoun's "opinion is also documented and certainly supported by the miner's length of coal mine employment and coal dust exposure." *Id*. Nonetheless, the administrative law judge properly accorded greater weight to the opinions of Drs. Fino and Selby than to the contrary opinion of Dr. Calhoun because he found their opinions to be better reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Although the Sixth Circuit has held that the opinions of treating physicians are entitled to greater weight than those of nontreating physicians, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), the Sixth Circuit has also indicated that this principle does not alter the administrative law judge's duty, as trier of fact, to evaluate the credibility of the treating physician's opinion, *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

[11]The administrative law judge stated that "[t]he opinions of Drs....Selby and Fino delinking the claimant's presumed total disability to coal mine employment are the most logical and reasoned." Decision and Order on Remand at 11.

found it to be corroborated by Dr. Fino's opinion. *See Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984).

Claimant, citing *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), specifically asserts that the administrative law judge erred in relying on the opinions of Drs. Fino and Selby concerning the cause of claimant's disability since their underlying premise, that claimant does not suffer from pneumoconiosis, is inaccurate. In *Tussey*, the Sixth Circuit held that since the existence of pneumoconiosis was already established by the x-ray evidence, Dr. Kress's finding that the miner did not have coal workers' pneumoconiosis deprived his observations of any probative value. *See Tussey*, 982 F.2d at 1042, 17 BLR at 2-24. The Sixth Circuit stated, "[i]t should be noted that the main point of Dr. Kress' [sic] report was that [the miner] did not have coal workers' pneumoconiosis." *Id*.

Here, as previously noted, although Judge Rosenzweig found the x-ray evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1), Drs. Fino and Selby opined that claimant does not suffer from pneumoconiosis. However, Dr. Fino stated that "[e]ven if pneumoconiosis were found to be present radiographically, [claimant] would not be disabled from performing his last mining job." Employer's Exhibit 4. Further, Dr. Selby stated that "[i]f [claimant] had never stepped foot in a coal mine he would still have the same respiratory and pulmonary capacity as he has today." Employer's Exhibit 8. Consequently, neither the disability causation opinion of Dr. Fino nor of Dr. Selby was premised on a finding that claimant does not suffer from pneumoconiosis. Thus, we reject claimant's assertion that the administrative law judge erred in relying on the opinions of Drs. Fino and Selby to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) on the ground that they were based on an inaccurate premise that claimant does not suffer from pneumoconiosis. *See Tussey, supra*. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). *See Warman, supra*; *Gibas, supra*; *Marcum v. Director, OWCP*,

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[12]The administrative law judge observed that "[s]upporting Dr. Selby is the opinion of Dr. Fino which is based on a review of all the medical evidence of record, thereby providing him with a broad base from which to draw his conclusions." Decision and Order on Remand at 11.

[13]We hold that any error by the administrative law judge in finding that the opinions of Drs. Anderson and Gallo are sufficient to establish rebuttal of the interim

11 BLR 1-23 (1987).

Finally, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). The administrative law judge considered the opinions of Drs. Anderson, Calhoun, Fino, Getty, Selby, Traughber and West. Whereas Drs. Calhoun, Traughber and West opined that claimant suffers from a totally disabling respiratory impairment, Director's Exhibit 9; Claimant's Exhibits 4, 5, 7, Drs. Anderson, Fino, Getty and Selby opined that claimant does not suffer from a totally disabling respiratory impairment, Employer's Exhibits 3, 5, 7, 8, 14. The administrative law judge stated, "I find the opinions of Drs. Getty, Anderson, Selby and Fino must be accepted on the question of whether the claimant is totally disabled from a respiratory standpoint." Decision and Order on Remand at 13. The administrative law judge observed that "[t]hree of these physicians conducted comprehensive examinations of the claimant and Dr. Fino reviewed the evidentiary record." *Id*. Hence, the administrative law judge stated, "I therefore accept these opinions over the contrary opinions of Drs. West, Calhoun and Traughber." *Id*. Inasmuch as the administrative law judge rationally found that the preponderance of the medical opinion evidence supports a finding that claimant does not suffer from a totally disabling respiratory impairment, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). *See Director, OWCP v. Greenwich*

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presumption at 20 C.F.R. §727.203(b)(3) is harmless as substantial evidence otherwise supports the administrative law judge's finding that the evidence is sufficient to establish subsection (b)(3) rebuttal based on the opinions of Drs. Fino and Selby. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also 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).

[14]Inasmuch as the administrative law judge relied on the most recent opinions of Drs. Fino and Selby in finding that the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3), we hold that claimant's argument, citing to *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988), that the administrative law judge erred in relying also on the opinions of Drs. Anderson and Gallo because they are not based on the most current medical evidence of claimant's condition is moot.

[15]Although the administrative law judge did not specifically indicate that he considered the credentials of the physicians with respect to his weighing of the evidence at 20 C.F.R. §718.204(c)(4), he properly accorded greater weight to the opinion of Dr. Fino than to the contrary opinions of Drs. Calhoun, West and

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); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

Since claimant failed to establish total disability at 20 C.F.R. §718.204(c), an essential element of entitlement, the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

Traughber because of Dr. Fino's superior qualifications in his weighing of the evidence at 20 C.F.R. §727.203(b)(3). *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Moreover, as previously noted, the record indicates that Dr. Selby is Board-certified in pulmonary disease. Employer's Exhibit 8.

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge