BRB No. 01-0234 BLA

LOWELL MITCHELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OLD BEN COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr., Raleigh, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (84-BLA-4679) of Administrative Law Judge Robert L. Hillyard 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).[1] This case is before the Board for the fifth time.

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted,

In the original Decision and Order, Administrative Law Judge Bernard J. Gilday, Jr. credited claimant with thirty-four years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 727.[2] Judge Gilday found the evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Judge Gilday also found the evidence sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2).[3] Accordingly, Judge Gilday denied benefits under 20 C.F.R. Part 727. Further, Judge Gilday found that claimant was not entitled to benefits under 20 C.F.R. Part 410, Subpart D. In response to claimant's appeal, the Board affirmed Judge Gilday's length of coal mine employment finding and his finding at 20 C.F.R. §727.203(a)(1). However, the Board vacated Judge Gilday's finding at 20 C.F.R. §727.203(b)(2) and remanded the case for further consideration pursuant to the standard set forth in *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987). The Board instructed Judge Gilday to consider the evidence at 20 C.F.R. §727.203(b)(3) and (b)(4), if reached.[4] Citing *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir.

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refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001).

[2]The regulations contained in 20 C.F.R. Part 727 are not affected by the recent amendments to the regulations.

[3]Administrative Law Judge Bernard J. Gilday, Jr. found the evidence insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(1). Judge Gilday also noted that he did not need to consider the claim pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4) in view of his finding pursuant to 20 C.F.R. §727.203(b)(2).

[4]The Board noted that Judge Gilday's finding that the evidence was sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1) precluded a finding that the evidence was sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4). *See Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995), *rev'g on other grounds*, 18 BLR 1-59 (1994)(*en banc*).

1987), the Board additionally instructed Judge Gilday to consider entitlement to benefits under 20 C.F.R. Part 718 if he found that claimant was not entitled to benefits under 20 C.F.R. Part 727. *Mitchell v. Old Ben Coal Co.*, BRB No. 86-3023 BLA (Nov. 30, 1988)(unpub.).

On first remand, Judge Gilday found the evidence insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(2) and (b)(3). Judge Gilday also found that his prior finding of invocation of the interim presumption at 20 C.F.R. §727.203(a)(1) precluded a finding of rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4). Accordingly, Judge Gilday ordered benefits to commence as of January 1980, the date the claim was filed. In disposing of employer's appeal, the Board affirmed Judge Gilday's findings at 20 C.F.R. §727.203(b)(2), (b)(3) and (b)(4). *Mitchell v. Old Ben Coal Co.*, BRB No. 89-3555 BLA (Aug. 19, 1992)(unpub.). Subsequently, the Board granted employer's request for reconsideration, but denied the relief requested as it reaffirmed its Decision and Order awarding benefits. *Mitchell v. Old Ben Coal Co.*, BRB No. 89-3555 BLA (Aug. 18, 1994)(unpub. Decision and Order on Motion for Reconsideration). Following employer's appeal, the United States Court of Appeals for the Seventh Circuit vacated Judge Gilday's finding at 20 C.F.R. §727.203(a)(1) and remanded the case for further consideration of the evidence in accordance with *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). *Old Ben Coal Co. v. Director, OWCP* [*Mitchell*], 62 F.3d 1003, 19 BLR 2-245 (7th Cir. 1995). In addition, the Seventh Circuit vacated Judge Gilday's finding at 20 C.F.R. §727.203(b)(2) and remanded the case for further consideration in light of *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995).[5] *Id*. Lastly, the Seventh Circuit vacated Judge Gilday's finding at 20 C.F.R. §727.203(b)(3) and remanded the case for further consideration in accordance with *Freeman United Coal Mining Co. v. Benefits Review Board* [*Wolfe*], 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1992), and *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992). *Id*.

On second remand, the case was transferred to Administrative Law Judge Robert L. Hillyard (the administrative law judge), who found the evidence insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1)-(4).[6] Accordingly, the

[5]The United States Court of Appeals for the Seventh Circuit noted that *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995), repudiated its dicta in *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987).

[6]In an Order dated April 22, 1996, Administrative Law Judge Robert L. Hillyard (the administrative law judge) denied claimant's request to file medical evidence concerning his current condition.

administrative law judge denied benefits under 20 C.F.R. Part 727. The administrative law judge also found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) (2000). Accordingly, the administrative law judge denied benefits under 20 C.F.R. Part 718. On claimant's appeal, the Board vacated the administrative law judge's denial of benefits and the administrative law judge's denial of claimant's request to reopen the record, and remanded the case for further consideration. The Board instructed the administrative law judge to reopen the record for the submission of claimant's evidence and to provide employer with an opportunity to submit rebuttal evidence.[7] *Mitchell v. Old Ben Coal Co.*, BRB No. 97-0464 BLA (Nov. 28, 1997)(unpub.).

On third remand, although the administrative law judge found the evidence insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1)-(3), he found the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(4). Further, the administrative law judge found the evidence insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(1)-(4). Accordingly, the administrative law judge awarded benefits to commence as of January 1, 1980, the date the claim was filed. On employer's appeal, the Board affirmed the administrative law judge's findings at 20 C.F.R. §§727.203(a)(1)-(3) and 727.203(b)(1) and (b)(4). However, the Board vacated the administrative law judge's findings at 20 C.F.R. §§727.203(a)(4), 727.203(b)(2) and (b)(3), and remanded the case for further consideration of the evidence. The Board instructed the administrative law judge to consider if the evidence supports rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(2) in light of *Foster* and at 20 C.F.R. §727.203(b)(3), if reached. Moreover, the Board instructed the administrative law judge to thoroughly discuss the evidence and set forth his findings in detail on remand with respect to the date from which benefits should commence, if reached. *Mitchell v. Old Ben Coal Co.*, BRB No. 99-0261 BLA (June 30, 2000)(unpub.).

On the most recent remand, the administrative law judge found the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(4). The

[7]Employer contends that the Board erred in ordering the administrative law judge to reopen the record on remand. The Board's prior disposition of this issue constitutes the law of the case, as there is no persuasive evidence that the law of the case doctrine should not be applied or that an exception has been shown. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993). Thus, we are not persuaded that there is reason for us to revisit this issue.

administrative law judge also found the evidence insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(2) and (b)(3). Accordingly, the administrative law judge again ordered benefits to commence as of January 1, 1980, the date the claim was filed.

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(4). Employer also challenges the administrative law judge's finding that the evidence is insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(2) and (b)(3). Further, employer challenges the administrative law judge's finding that benefits commence as of January 1980, the date the claim was filed. Claimant responds to employer's appeal, urging affirmance of the administrative law judge's Decision and Order on Remand.[8] The Director, Office of Workers' Compensation Programs, has declined to respond to employer's appeal.

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).

[8]Employer filed a brief in reply to claimant's response brief, which reiterated its prior contentions.

Initially, employer contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(4). Specifically, employer asserts that the administrative law judge erred in failing to weigh all of the relevant medical opinion evidence. Employer's assertion is based on the premise that the administrative law judge relied exclusively on medical evidence submitted after the record was reopened. Contrary to employer's assertion, the administrative law judge considered all of the relevant medical opinion evidence of record. The administrative law judge observed that "[f]ive of the physicians of record, including Dr. Rosecan, gave medical opinions between 1980 and 1986."[9] Decision and Order on Remand at 5. The administrative law judge also observed that "[t]he most recent evidence of record consists of opinions by Drs. Tuteur, Rosecan, and Kahn." *Id*. Based upon his consideration of all of the relevant medical opinion evidence of record, the administrative law judge accorded greater weight to the most recent evidence. The administrative law judge stated, "[i]n its June 30, 2000 Decision and Order, the Board held that the most recent evidence of record, including the 1998 medical opinions of Drs. Rosecan, Khan, and Tuteur, was properly given more weight than earlier evidence in the October 28, 1998 Decision and Order awarding benefits."[10] *Id*. at 7-8 n.4. The Board's prior disposition of this issue constitutes

[9]The administrative law judge stated that "Dr. Chiou examined the [c]laimant on May 14, 1980" and "Dr. Getty examined the [c]laimant on December 12, 1983." Decision and Order on Remand at 5. The administrative law judge also stated that "Drs. Castle, O'Neill, and Renn did not examine the [c]laimant but issued consultative reports dated between 1983 and 1986 based on their review of the medical evidence." *Id*. Further, the administrative law judge stated that "Dr. Rosecan...testified that he examined the [c]laimant on thirty-one occasions between May 1970 and March 1983." *Id*.

[10]In its previous Decision and Order, the Board stated that "[t]he administrative law judge reviewed the record in its entirety and rationally determined that the evidence

the law of the case, as employer has advanced no new argument in support of altering the Board's previous holding and no intervening case law has contradicted the Board's resolution of this issue. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993).

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submitted after the administrative law judge reopened the record, which is a minimum of twelve years most recent in time, most accurately depicted the state of claimant's health, and was thus entitled to greater weight." *Mitchell v. Old Ben Coal Co.*, BRB No. 99-0261 BLA (June 30, 2000)(unpub.).

With regard to the most recent medical opinion evidence, the administrative law judge stated, "I find the evidence which supports a finding of a totally disabling respiratory impairment to be well reasoned and better supported than the evidence which controverts it." Decision and Order on Remand at 8. In a report dated May 22, 1998, Dr. Kahn opined that claimant was totally disabled due to coal miner's pneumoconiosis and pulmonary emphysema. Claimant's Exhibit (Reopened Record) 1. Similarly, in a report dated June 2, 1998, Dr. Rosecan opined that claimant was totally incapacitated from working in a coal mine because of coal workers' pneumoconiosis. Claimant's Exhibit (Reopened Record) 2. However, Dr. Tuteur opined that claimant is not disabled because of coal workers' pneumoconiosis. Employer's Exhibit (Reopened Record) 1. Dr. Tuteur further opined that claimant's disability is due in part to arteriosclerotic heart disease and its consequences and only to a limited extent to chronic obstructive pulmonary disease. *Id*. The administrative law judge permissibly discredited Dr. Tuteur's opinion because he found it not to be reasoned.[11] *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). Thus, we reject employer's assertion that the administrative law judge erred in discrediting Dr.

[11]The administrative law judge observed that "Dr. Tuteur noted a fifty year smoking history and a thirty-eight year coal mine employment history, both of which are accurate histories." Decision and Order on Remand at 7. Nonetheless, the administrative law judge stated that "[Dr. Tuteur] failed to explain, however, why the [c]laimant's lengthy coal mine employment history failed to contribute in any way to the [c]laimant's impairment." *Id*.

Tuteur's opinion.[12]

[12]The administrative law judge observed that "[Dr. Tuteur] stated...that the [c]laimant's pulmonary function, as demonstrated by objective testing, is normal, 'or at worst nearly normal,' and is in no way sufficient to render him disabled." Decision and Order on Remand at 7. The administrative law judge stated that "[s]uch opinion is inconsistent and equivocal." *Id*. Since the administrative law judge has provided an alternate basis for discrediting Dr. Tuteur's opinion, *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), in that he discredited the opinion of Dr. Tuteur because he found Dr. Tuteur's opinion not to be 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), we hold that any error by the administrative law judge in discrediting Dr. Tuteur's opinion on this basis is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer also asserts that the administrative law judge erred in mechanically according greater weight to the opinion of Dr. Rosecan than to the contrary opinion of Dr. Tuteur based upon Dr. Rosecan's status as claimant's treating physician. Contrary to employer's assertion, the administrative law judge did not apply a blanket rule that the opinion of claimant's treating physician is entitled to greater weight than the opinion of a consulting physician. *See Peabody Coal Co. v. Helms* [*Earl*], 901 F.2d 571, 13 BLR 2-449 (7th Cir. 1990). Rather, the alj's decision indicates that he reflected on why he found that the opinion of claimant's treating physician, Dr. Rosecan, should be accorded greater weight than the contrary opinion of Dr. Tuteur. *See Helms, supra*; *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). The administrative law judge indicated that Dr. Rosecan's treatment of claimant provided Dr. Rosecan with a better perspective on claimant's pulmonary condition. The administrative law judge stated that "Dr. Rosecan has treated the [c]laimant over a period of approximately thirty years." Decision and Order on Remand at 6. The administrative law judge also stated that "[Dr. Rosecan] examined the [c]laimant on over thirty occasions between May 1970 and March 1983." *Id*. Furthermore, the administrative law judge stated that "Dr. Rosecan based his finding on physical examination, symptoms, objective testing, and histories,[13] including a thirty-eight year coal mine employment history." *Id*. Thus, based on the administrative law judge's consideration of Dr. Rosecan's opinion, we reject employer's assertion that the administrative law judge erred in mechanically according greater weight to the opinion of Dr. Rosecan than to the contrary opinion of Dr. Tuteur, based on Dr. Rosecan's status as claimant's treating physician.

Employer additionally argues that Dr. Rosecan's 1998 opinion is not reasoned since, employer asserts, it is based on a non-conforming pulmonary function study. Contrary to employer's assertion, an administrative law judge may not reject a medical opinion solely because it is based, in part, on a non-conforming pulmonary function study. *See Casey v. Director, OWCP*, 7 BLR 1-873 (1985). Further, employer asserts that the administrative law judge erred in finding that Dr. Rosecan's 1998 opinion is consistent with his prior opinions. Specifically, employer argues that the prior opinions of Dr. Rosecan are inconsistent and unreliable since, employer asserts, Dr. Rosecan changed his opinion in his 1983 report that claimant's disability was occupationally related to an opinion in his 1986 report that claimant's disability was due to a pneumoconiosis related heart disease. In considering Dr. Rosecan's prior opinions, the administrative law judge stated that "Dr. Rosecan...diagnosed pneumoconiosis and opined that [claimant] is totally disabled due at least in part to that

[13]The administrative law judge observed that "[a]lthough Dr. Rosecan, in his 1988 report, noted only that the [c]laimant 'quit smoking in 1980,' he noted a smoking history of two packs per day for twenty-five years at his 1983 deposition." Decision and Order on Remand at 6. The administrative law judge stated that "[t]his parallels the smoking history which I have previously found." *Id*.

condition." Decision and Order on Remand at 5. With regard to Dr. Rosecan's 1998 opinion, the administrative law judge stated that "Dr. Rosecan found the existence of a totally disabling respiratory impairment due to the [c]laimant's work as a coal miner." *Id*. Because the administrative law judge properly found that Dr. Rosecan consistently opined that claimant suffered from a disabling respiratory impairment, we reject employer's assertion that the administrative law judge erred in finding that Dr. Rosecan's 1998 opinion is consistent with his prior opinions.

Employer also asserts that the opinions of Drs. Rosecan and Khan are insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(4). Specifically, employer asserts that the administrative law judge cannot assess whether claimant is totally disabled to perform his usual coal mine employment because the record lacks sufficient evidence of the exertional requirements of claimant's usual coal mine employment. As previously noted, Dr. Rosecan opined that claimant is totally incapacitated from working in a coal mine because of his coal workers' pneumoconiosis. Claimant's Exhibit (Reopened Record) 2. Similarly, Dr. Khan opined that claimant is totally disabled due to coal miner's pneumoconiosis and pulmonary emphysema. Claimant's Exhibit (Reopened Record) 1. The administrative law judge stated that "[a]lthough Dr. Rosecan did not address the specific requirements of the [c]laimant's last job in his 1998 report, he opined at the 1983 deposition that the [c]laimant could not perform his last coal mining job as a tipple repairman, a job which necessitates walking up and down steps and a 'great deal of physical exertion.'" Decision and Order on Remand at 6. Further, the administrative law judge observed that "Dr. [Khan] noted that the [c]laimant becomes short of breath 'on slight exertion,' that he can only walk a distance of one block before he must stop due to shortness of breath, and that he cannot climb one flight of stairs."[14] *Id*. at 7. The administrative law judge stated that "[t]hese symptoms support Dr. Khan's finding that the [c]laimant cannot perform his last coal mine job 'as a welder and heavy equipment operator' and coal loader, positions which, according to the [c]laimant's March 14, 1983 hearing testimony, involve climbing stairs and lifting heavy loads." *Id*. Since the reports of Drs. Rosecan and Khan contain opinions

[14]Although the administrative law judge actually attributed this notation to Dr. Rosecan, rather than to Dr. Khan, a review of Dr. Khan's medical report and the administrative law judge's decision indicates that this was a typographical error by the administrative law judge. Claimant's Exhibit (Reopened Record) 1; Decision and Order on Remand at 6-7.

phrased in terms of claimant's total disability, rather than in terms of medical assessments of physical abilities or exertional limitations, we reject employer's assertion that the opinions of Drs. Rosecan and Khan are insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(4), based upon employer's assertion that the record lacks sufficient evidence of the exertional requirements of claimant's usual coal mine employment. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990).

Employer next asserts that Dr. Khan's opinion is insufficient to establish that claimant's disability is solely from a respiratory or pulmonary impairment. In a report dated May 22, 1998, Dr. Khan opined that "[claimant] is totally disabled due to coal miner's pneumoconiosis and pulmonary emphysema." Claimant's Exhibit (Reopened Record) 1. Dr. Khan also opined that "[t]he contributing factors are also history of hypertension and coronary artery disease and coronary bypass surgery (CABG)." *Id*. Further, Dr. Khan opined that "[claimant] also has osteoarthritis and right hip prosthesis" and "[claimant] is not a suitable candidate to work in the coal mines due to further deterioration of his breathing problem and he is also not a suitable candidate to be employed in any other gainful and comparable job." *Id*. Hence, Dr. Khan concluded, "[b]ased upon his age, education, work experience and due to cough, shortness of breath, chest pain, sputum production coupled with pulmonary impairment due to emphysema and coal miner's pneumoconiosis, with a reasonable degree of medical certainty [claimant] is unemployable." *Id*.

In its previous Decision and Order, the Board specifically instructed the administrative law judge to consider whether Dr. Khan's opinion contains a diagnosis of a totally disabling respiratory or pulmonary impairment as required at 20 C.F.R. §727.203(a)(4). However, as employer argues, the administrative law judge did not specifically consider in his decision on remand whether Dr. Khan's opinion supports invocation under subsection (a)(4). Rather, the administrative law judge merely noted Dr. Khan's findings. Nonetheless, since the administrative law judge rationally found that Dr. Rosecan's opinion outweighs Dr. Tuteur's contrary opinion, *see Clark, supra*; *Fields, supra*; *Fuller, supra*, we hold that any error by the administrative law judge in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Therefore, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(4).

Next, we hold that employer's contention that the administrative law judge erred in finding the evidence insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(2) has merit. In its previous Decision and Order, the Board specifically instructed the administrative law judge to consider whether the evidence supports a finding of rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(2) in light of the Seventh

Circuit's holding in *Foster*.[15] However, as employer argues, the administrative law judge did not weigh the conflicting evidence in accordance with the Seventh Circuit's holding in *Foster*. Thus, we vacate the administrative law judge's finding that the evidence is insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(2), and again remand the case for further consideration of the evidence in light of the Seventh Circuit's holding in *Foster*. *See generally Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Lenig v. Director, OWCP*, 9 BLR 1-147 (1986). Furthermore, in view of our disposition of the case at 20 C.F.R. §727.203(b)(2),[16] we vacate the administrative law judge's finding that the evidence is insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3), and remand the case for further consideration of the evidence. *See Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994); *Amax Coal Co. v Beasley*, 957 F.2d 324 (7th Cir. 1992); *Freeman United Coal Mining Co. v. Benefits Review Board*, 912 F.2d 164 (7th Cir. 1992).

Finally, employer contends that the administrative law judge erred in finding the date from which benefits commence to be January 1980, the date the claim was filed. The administrative law judge stated, "[i]t cannot be determined from Dr. Rosecan's [1983] deposition testimony the date on which the [c]laimant could not perform the work of a miner." Decision and Order on Remand at 9. The administrative law judge also stated that "[i]t cannot be determined from [the 1998] reports when the [c]laimant became totally

[15]In *Foster*, the Seventh Circuit held that the evidence was sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(2) where the miner's inability to work was not due to pneumoconiosis, but a back injury that occurred during his coal mine employment.

[16]In *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), the Seventh Circuit held that the evidence was sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) where the miner had become totally disabled by a stroke that was not caused by coal dust exposure and where there was no evidence establishing a nexus between the miner's stroke and the miner's respiratory condition.

disabled." *Id*. Hence, the administrative law judge stated, "[s]ince I cannot make a finding as to the month of onset of total disability based on the record, I find that the [c]laimant is entitled to benefits commencing January 1980, the month in which the claim was filed." *Id*. The pertinent regulations provide that "[w]here the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed." 20 C.F.R. §725.503(b).

Citing *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), employer asserts that the provision of 20 C.F.R. §725.503(b), which allows an administrative law judge to utilize the filing date of a claim as the date from which benefits commence when there is no medical proof submitted by claimant that he had complicated coal workers' pneumoconiosis or a disabling respiratory impairment caused by pneumoconiosis at the time the claim was filed, violates the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), 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). The regulations generally provide that "[e]xcept as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. §554 *et seq.*" 20 C.F.R. §725.452(a). Further, the APA provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). Since 20 C.F.R. §725.503(b) specifically provides that benefits shall commence on the date that the claim is filed when the record does not contain evidence which can establish the date of disability due to pneumoconiosis, 20 C.F.R. §725.503(b), we hold that the APA is inapplicable to 20 C.F.R. §725.503(b), 5 U.S.C. §556(d). Therefore, we reject employer's assertion that the provision of 20 C.F.R. §725.503(b), which allows an administrative law judge to utilize the filing date of a claim as the date from which benefits commence when there is no medical proof submitted by claimant that he had complicated coal workers' pneumoconiosis or a disabling respiratory impairment caused by pneumoconiosis at the time the claim was filed, violates the APA.

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 proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge