BRB Nos. 98-1548 BLA, 98-1548 BLA-A,
93-0911 BLA and 93-0911 BLA-A

ODIE RIDINGS	)	BRB Nos. 98-1548 BLA
	)	and 98-1548 BLA-A
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
C & C COAL COMPANY	)	
	)	
and	)	
	)	
L & M COAL CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED:
	)	
Employers/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	
ODIE RIDINGS	)	BRB Nos. 93-0911 BLA
	)	and 93-0911 BLA-A
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
C & C COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	

L & M COAL CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employers/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise III (Vinyard & Moise), Abington, Virginia, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employers and carrier.

Rodger Pitcairn (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:

Employers and carrier (employer) appeal the Decision and Order (97-BLA-1804) of Administrative Law Judge Richard T. Stansell-Gamm 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 has a lengthy procedural history. In his initial Decision and Order issued on December 15, 1980, Administrative Law Judge Arthur C. White credited claimant with twenty-eight years of qualifying coal mine

employment and determined that C & C Coal Company (C&C) was properly designated the responsible operator herein. Judge White adjudicated this claim, filed on April 6, 1978, pursuant to the provisions at 20 C.F.R. Part 727, and found that the evidence established invocation of the interim presumption at 20 C.F.R. §727.203(a)(1) and did not establish rebuttal of that presumption at 20 C.F.R. §727.203(b)(1)-(4). Accordingly, benefits were awarded. Director's Exhibit 41.

On appeal, the Board affirmed Judge White's designation of C&C as the responsible operator pursuant to 20 C.F.R. §725.493, his determination of the onset date of disability, and his assessment of interest on past due payments of benefits, but vacated his finding that the evidence was insufficient to establish rebuttal at Section 727.203(b)(2) and remanded this case for a reevaluation of Dr. Abernathy's opinion and articulation of the rationale for the administrative law judge's credibility determinations. *Ridings v. C & C Coal Co., Inc.*, 6 BLR 1-227 (1983); Director's Exhibit 57.

Employer timely filed a motion for reconsideration with the Board. Director's Exhibit 58. While employer's motion was pending, claimant submitted new medical evidence to Judge White for consideration, Director's Exhibit 60, and employer filed a motion to exclude the evidence, Director's Exhibits 61, 62. In a Supplemental Decision and Order on Remand issued on October 25, 1983, Judge White did not address the new evidence or employer's motion to exclude it, but found that the evidence of record established rebuttal at Section 727.203(b)(2) and denied benefits. Director's Exhibit 63.

Both parties appealed to the Board, and by Order of December 19, 1983, the Board dismissed employer's pending motion for reconsideration, indicating that employer could raise in its brief on appeal the issues presented in the motion. Director's Exhibit 65. Claimant subsequently filed motions with the Board and Judge White for consideration of the new medical evidence previously submitted. Director's Exhibits 69, 70. By Order dated July 23, 1984, the Board dismissed claimant's appeal and remanded the case to Judge White for consideration of claimant's petition for modification. Director's Exhibit 73.

In a Second Supplemental Decision and Order on Remand issued on December 26, 1984, Judge White found that claimant failed to establish a mistake in a determination of fact or a change in conditions, and thus found that modification pursuant to 20 C.F.R. §725.310 was not appropriate. Director's Exhibit 79.

Both parties again appealed to the Board, and while the appeals were pending, claimant filed a motion for reconsideration and modification with Judge White. Director's Exhibit 90. By Order of February 27, 1986, the Board dismissed claimant's appeal and remanded the case to Judge White for consideration of modification. Director's Exhibit 93.

In a Third Supplemental Decision and Order on Remand issued on May 5, 1986,

Judge White rejected claimant's motion for reconsideration and modification, finding no mistake in a determination of fact or change in conditions at Section 725.310. Director's Exhibit 95.

While this case was pending on appeal before the Board, claimant filed another motion for modification and reconsideration of new evidence with Judge White. Director's Exhibit 105. By Order dated July 31, 1987, the Board dismissed claimant's appeal and remanded the case to the administrative law judge for modification proceedings. Director's Exhibit 108. On June 1, 1988, Administrative Law Judge G. Marvin Bober issued an Order of Remand in light of the decision of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Lee v. Consolidation Coal Co.*, 843 F.2d 159, 11 BLR 2-106 (4th Cir. 1988), and remanded this case to the district director for initiation of modification proceedings. Director's Exhibit 113.

The case was subsequently assigned to Administrative Law Judge Quentin P. McColgin for hearing. In a Decision and Order issued on January 8, 1993, Judge McColgin declined to address the responsible operator issue as beyond the scope of claimant's modification petition, and found that no change in conditions was established. Judge McColgin further found that a mistake in a determination of fact was made, inasmuch as the weight of the x-ray evidence was negative for pneumoconiosis and thus insufficient to establish invocation of the interim presumption at Section 727.203(a)(1), but that Judge White's Decision and Order, issued on December 15, 1980, additionally found invocation established at Section 727.203(a)(2). Judge McColgin then found that rebuttal was established at Section 727.203(b)(2), thus modification was not appropriate pursuant to Section 725.310, and benefits were denied. Director's Exhibit 182.

On appeal, the Board reversed the administrative law judge's finding that claimant failed to establish modification pursuant to Section 725.310, and remanded this case for *de novo* review in light of *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The Board affirmed the administrative law judge's finding that the x-ray evidence of record was insufficient to establish invocation pursuant to Section 727.203(a)(1), but instructed the administrative law judge on remand to reconsider the evidence relevant to invocation at Section 727.203(a)(2)-(4). The Board also vacated the administrative law judge's finding of rebuttal at Section 727.203(b)(2) and instructed him on remand to consider the evidence relevant to rebuttal at Section 727.203(b)(2)-(4) pursuant to current controlling authority, and to consider claimant's entitlement under 20 C.F.R. Part 410, Subpart D if he found no entitlement under 20 C.F.R. Part 727. Lastly, the Board reaffirmed its prior determination that Judge White's designation of C&C as the responsible operator herein was supported by substantial evidence. *Ridings v. C & C Coal Co., Inc. (Ridings II)*, BRB Nos. 93-0911 BLA and 93-0911 BLA-A (Nov. 10, 1994)(unpublished); Director's Exhibit 193.

Employer timely filed a motion for reconsideration with the Board, Director's Exhibit 194, and claimant forwarded new evidence to the Board for inclusion in the record as additional evidence in support of his modification request, Director's Exhibit 196. By Order dated October 30, 1996, the Board remanded this case to the district director for modification proceedings. Director's Exhibit 198.

On remand, this case was reassigned to Administrative Law Judge Richard T. Stansell-Gamm for hearing. In a Decision and Order issued on July 31, 1998, the administrative law judge credited claimant with at least twenty years of qualifying coal mine employment, and found invocation of the interim presumption established at Section 727.203(a)(1), with no rebuttal.

In the present appeal, employer challenges the administrative law judge's jurisdiction to consider claimant's fourth request for modification pursuant to Section 725.310, and contends that it was improperly designated the responsible operator herein. Employer also challenges the administrative law judge's finding of invocation at Section 718.203(a)(1), his finding of no rebuttal at Section 718.203(b)(3), and his onset findings pursuant to 20 C.F.R. §725.503(b). Employer requested reinstatement of its motion for reconsideration in BRB Nos. 93-0911 BLA and 93-0911 BLA-A, and the Board consolidated these appeals by Order issued on September 2, 1998. Claimant cross-appeals urging affirmance of the award of benefits and challenging the administrative law judge's onset findings at Section 725.503(b). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's arguments regarding the responsible operator and modification issues.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Turning first to the procedural issue, employer maintains that the administrative law judge lacked jurisdiction to consider claimant's fourth request for modification. In support of its position, employer relies on the holdings in *Midland Coal Co. v. Director, OWCP [Luman]*, 149 F.3d 558, 21 BLR 2-451 (7th Cir. 1998), and *Peabody Coal Co. v. Abner*, 118 F.3d 1106 21 BLR 2-154 (6th Cir. 1997), which barred successive requests for reconsideration. Employer's arguments are without merit. The Director correctly notes that the terms "modification" and "reconsideration" have specialized and different meanings under the Act and its implementing regulations. *See* 20 C.F.R. §§725.479, 725.480, 802.406, 802.407. Inasmuch as Fourth Circuit and Board case law recognize that multiple filings for modification are permissible, *see generally Lisa Lee Mines v. Director, OWCP [Rutter]*, 86

F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Garcia v. Director, OWCP*, 12 BLR 1-24 (1988), the administrative law judge properly adjudicated claimant's fourth request for modification pursuant to the standard articulated by the Fourth Circuit in *Jessee*, *supra*.[1]

Employer next challenges its designation as responsible operator herein, specifically, Judge White's finding that "C & C Coal Company, Inc. is the last employer for whom the Claimant worked for a cumulative period of at least one year and is the properly designated responsible coal mine operator in this case under Subpart F of Part 725 of the regulations," Director's Exhibit 41 at 2. Employer asserts that this determination is not supported by substantial evidence because claimant was not employed by C&C for at least one calendar year as required by 20 C.F.R. §725.493(a)(1), and the record contains no evidence of any common ownership, parent-subsidiary relationship or successor relationship between C&C and any other company. Employer also maintains that Judge White's failure to provide any explanation or support for his summary conclusion does not comport with the requirements of 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), 30 U.S.C. §932(a). Employer's arguments have merit.

[1] We reject, as contrary to applicable law, the arguments raised in employer's motion for reconsideration, *see* Director's Exhibit 194 at 7-14, that the Director lacked standing to challenge the administrative law judge's modification findings, *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994), and that claimant is not automatically entitled to have his claim considered *de novo* on the merits simply because he alleges that the prior denial was in error, *see Jessee*, *supra*.

In previously affirming the administrative law judge's finding on the issue, the Board noted that the evidence of record showed that claimant's most recent employer was C&C for a period of 10 months and 2 weeks; that claimant worked at least eight months for T.M. Coal Company, Inc. (T.M.), which has the same corporate officers and mailing address as C&C; that claimant testified that L & M Coal Corporation (L&M), the company he worked for immediately prior to C&C, was "the same men but they changed the name of the company," Hearing Transcript at 26; and that C&C provided no contradictory evidence. On the basis of the evidence presented, the Board held the only rational conclusion was that C&C, T.M. and L&M were the same corporate entity,[2] and held that where, as here, the putative responsible operator's theory of non-liability depended upon information within its exclusive control, it must carry the burden of producing evidence to support its theory. *Ridings*, 6 BLR at 1-231. Employer's argument that the Board improperly shifted the burden of proof to C&C, however, finds support in the subsequent decision of the Fourth Circuit in *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995), wherein the Court, while noting that the Act and its accompanying regulations do not specifically address who has the burden of proving the responsible operator issue, recognized that the regulations require the Director to identify, notify and develop evidence regarding, potential responsible operators, *see* 20 C.F.R. §§725.410(b), 725.412. Thus, the Court upheld the dismissal of the named employer where the Director failed to develop sufficient evidence to enable the administrative law judge to determine whether that employer or another company satisfied the regulatory criteria for designation as the responsible operator. *Matney*, *supra*. Because employer herein has demonstrated an exception to the law of the case doctrine, *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting), we vacate Judge White's finding that C&C is the properly designated responsible operator, and remand this case for the administrative law judge to adjudicate the issue in light of *Matney*, *supra*, and provide an analysis which comports with the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[2] Employer asserts, however, that the mere fact of common management does not establish common ownership, and notes that the various companies operated different mines; claimant's paychecks were issued by different companies; each company had different operating officers; the companies' taxpayer identification numbers and post office box numbers were different; and claimant received different wage and tax statements from each of the companies. Employer's Brief at 27-29; Director's Exhibit 194 at 18.

Turning to the merits, employer challenges the administrative law judge's finding that claimant established invocation pursuant to Section 727.203(a)(1).[3] In evaluating the x-ray evidence of record thereunder, the administrative law judge determined that the record contained fourteen films which were uniformly interpreted as positive for pneumoconiosis, and six films which were interpreted as negative for pneumoconiosis.[4] Of the remaining seven films which received conflicting interpretations, the administrative law judge, based on his crediting of a preponderance of interpretations provided by physicians with superior qualifications, found that one film was positive for pneumoconiosis and six films were negative. The administrative law judge then found invocation established based on a numerical preponderance of positive films. Decision and Order at 9-19. Employer correctly maintains, however, that the administrative law judge miscalculated the number of positive versus negative films, inasmuch as he counted the positive interpretations by Drs. Navani and Fleenor of a single September 6, 1995 film as two positive films.[5] *See* Decision and Order at 14, 18; Director's Exhibits 170, 204. The administrative law judge also counted films dated

[3] We reject employer's argument that the administrative law judge erroneously performed a *de novo* review of the x-ray evidence in view of the Board's prior affirmance of Judge McColgin's finding that invocation was not established at Section 727.203(a)(1). Inasmuch as new x-ray evidence was submitted in support of claimant's request for modification, Judge Stansell-Gamm properly reweighed the evidence thereunder.

[4] Contrary to employer's arguments, the administrative law judge did not abuse his discretion in declining to count the interpretations provided by Drs. Buck and Saha as negative for pneumoconiosis. The administrative law judge determined that Dr. Buck read the November 18, 1997 film in order to assess the effectiveness of radiation treatment for claimant's lung cancer, *see* Claimant's Exhibit 4; and that Dr. Saha read the April 20, 1988 film for the presence or absence of pneumonia, *see* Director's Exhibit 202. Inasmuch as neither physician classified these films as positive or negative for pneumoconiosis, the administrative law judge reasonably concluded that their interpretations were not probative. Decision and Order at 17-18.

[5] While the administrative law judge determined that Dr. Fleenor reported his positive interpretation on September 6, 1995, in conjunction with his examination report of that date, Director's Exhibit 195, the administrative law judge counted the interpretation, which did not record the date on which the film was taken, as a separate September 1995 film distinct from the September 6, 1995 film obtained by Dr. Navani. Decision and Order at 14, 18. Employer accurately observes, however, that Dr. Navani's radiology report lists Dr. Fleenor as the physician who ordered the film. Director's Exhibit 204.

March 10, 1997 and March 25, 1997, and a CT scan taken March 10, 1997, as positive for pneumoconiosis despite the fact that they were not classified as required by 20 C.F.R. §§410.428, 718.102, 727.206, under any of the specified classification systems. *See* Decision and Order at 16, 18; Director's Exhibit 209; Claimant's Exhibit 4. Consequently, we vacate the administrative law judge's findings pursuant to Section 727.203(a)(1), for a reevaluation of the x-ray evidence in accordance with *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). If, on remand, the administrative law judge finds that invocation at Section 727.203(a)(1) is not established, he must determine whether the evidence of record is sufficient to establish invocation at Section 727.203(a)(2)-(4), and, if so, whether the evidence establishes rebuttal at Section 727.203(b)(4). Further, if entitlement is not established under 20 C.F.R. Part 727, the administrative law judge must also consider claimant's entitlement under 20 C.F.R. Part 410, Subpart D. *Muncy v. Wolfe Creek Collieries Coal Co., Inc.*, 3 BLR 1-627 (1981).

Employer next challenges the administrative law judge's finding that rebuttal was not established at Section 727.203(b)(3),[6] arguing that the administrative law judge provided invalid reasons for discounting the opinions of Drs. Fino, Dahhan and Castle, and for crediting the contrary opinions of Drs. Robinette, Fleenor and Molony. Initially, we note that the administrative law judge's reevaluation of the evidence pursuant to Section 727.203(a)(1) on remand may impact upon his findings at Section 727.203(b)(3), inasmuch as he gave less weight to the opinions of physicians who did not diagnose pneumoconiosis, which the administrative law judge found contrary to the preponderance of the x-ray evidence, and determinative weight to the opinion of Dr. Robinette, supported by the opinions of claimant's treating physicians, Drs. Fleenor and Molony, which the administrative law judge found most consistent with the x-ray and other objective medical evidence of record. Decision and Order at 38. As it is not clear whether the administrative law judge will find invocation established on remand pursuant to Section 727.203(a)(1), we vacate his findings pursuant to Section 727.203(b)(3) for reevaluation of the relevant evidence thereunder on remand. If the administrative law judge again finds invocation established at Section 727.203(a)(1), when

[6] Other than generally asserting that the administrative law judge relied on impermissible rationales and mistakes of fact and law, employer has failed to identify specific errors made by the administrative law judge in the evaluation of the evidence and the applicable law in finding no rebuttal pursuant to Section 727.203(b)(1)-(2). Unless a party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. *See* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Consequently, and inasmuch as the administrative law judge's findings pursuant to Section 727.203(b)(1)-(2) are supported by substantial evidence and in accordance with applicable law, they are affirmed.

he addresses rebuttal at Section 727.203(b)(3), he should consider, as employer correctly notes, that while an opinion regarding disability causation may be discounted if it is actually premised on an erroneous assumption which contradicts a finding of the administrative law judge, the probative value of an opinion is not automatically diminished if the disability causation findings are entirely independent of the erroneous assumption. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996)(Williams, J., dissenting); *Lambert v. Itmann Coal Co.*, 70 F.3d 112, 20 BLR 2-119 (4th Cir. 1995); *LeMaster v. Imperial Colliery Co.*, 73 F.3d 358, 20 BLR 2-20 (4th Cir. 1995); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). We also agree with employer's argument that the administrative law judge improperly evaluated the nonconforming, qualifying pulmonary function studies of record, which affected his credibility determinations with regard to the medical opinions. While the Board has held that pulmonary function studies do not have to conform to quality standards in order to constitute relevant medical evidence on rebuttal, and that a medical opinion based on a non-qualifying and nonconforming pulmonary function study must be considered relevant rebuttal evidence, *see Hardy v. Director, OWCP*, 7 BLR 1-722 (1985); *Levitz v. Rochester & Pittsburgh Coal Co.*, 4 BLR 1-497 (1982), a qualifying study which lacks the requisite tracings cannot be considered valid and reliable and then used, as here, to discredit the opinion of a physician who deems the study invalid and thus refuses to base any of his conclusions regarding disability causation on that study. *See* Decision and Order at 24, 25, 38; *see generally Lambert*, *supra*. Additionally, the notations of the administering technicians on the April 30, 1991 and April 7, 1997 pulmonary function tests that claimant's cooperation was "fair" are not inconsistent with the invalidating physicians' opinions that claimant did not exert maximal effort. *See* Decision and Order at 22-25; Director's Exhibits 170, 175, 176, 204; Claimant's Exhibit 3; Employer's Exhibits 14, 16, 17. While a notation of "fair cooperation" may be sufficient to indicate a test is conforming, *see Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984), such a notation does not necessarily indicate that the test is valid, particularly where a qualifying test lacks the requisite tracings and cannot be validated. Consequently, in determining whether the evidence is sufficient to establish rebuttal at Section 727.203(b)(3) on remand, the administrative law judge must reassess the medical opinions of record and their underlying documentation in accordance with the principles enunciated by the Fourth Circuit in *Stiltner*, *supra*; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Lastly, both claimant and employer challenge the administrative law judge's findings pursuant to Section 725.503(b) regarding the date of onset of total disability due to pneumoconiosis. Inasmuch as the administrative law judge's reevaluation of the evidence at Sections 727.203(a)(1) and 727.203(b)(3) may impact upon his findings at Section 725.503, we also vacate the administrative law judge's findings thereunder. If on remand the administrative law judge determines that claimant is entitled to benefits, he must consider all relevant evidence to determine the appropriate date from which benefits are payable herein

consistent with *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Accordingly, the Decision and Order - Award of Benefits of the administrative law judge awarding benefits is affirmed in part, vacated in part, and this case is remanded for further consideration 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