BRB Nos. 96-0464 BLA
and 96-0464 BLA-A

ALICE SINESKY )
(Widow of ALBAN SINESKY) )
)
Claimant-Respondent/)
Cross-Petitioner )
)
v. )
)
MATHIES COAL COMPANY )
) DATE ISSUED:
Employer-Petitioner/)
Cross-Respondent )
)
DIRECTOR, OFFICE OF WORKERS' )
COMPENSATION PROGRAMS, UNITED )
STATES DEPARTMENT OF LABOR )
)
Party-in-Interest ) DECISION and ORDER

Appeal of the Third Decision and Order on Remand of Robert S. Amery, Administrative Law Judge, United States Department of Labor.

Jean Zeiler (United Mine Workers' of America), Belle Vernon, Pennsylvania, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Third Decision and Order on Remand (81-BLA-7859) of Administrative Law Judge Robert S. Amery 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 is before the Board for the fourth time. In its most recent Decision and Order, the Board affirmed the administrative law judge's finding that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), held that the administrative law judge's finding that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2) is law of the case, vacated the administrative law judge's finding of rebuttal pursuant to Section 727.203(b)(3) and remanded the case for reconsideration of the rebuttal evidence and to specifically

consider whether the record should be reopened. The Board also held that the claim must be considered pursuant to 20 C.F.R. Part 718 if entitlement is not established pursuant to 20 C.F.R. Part 727. *Sinesky v. Mathies Coal Co.*, BRB Nos. 94-4046 BLA and 94-4046 BLA-A (May 31, 1995)(unpub.).

On October 12, 1995, the administrative law judge issued an Order denying employer's Motion to Reopen the Record. The administrative law judge then issued his Third Decision and Order on Remand in which he again denied employer's motion to reopen the record and found that employer failed to rebut the presumption that the miner was totally disabled due to pneumoconiosis at the time of his death pursuant to Section 727.203(b)(3). Accordingly, benefits were awarded.

In the instant appeal, employer contends that the administrative law judge erred in denying employer's Motion to Reopen the Record and in failing to find rebuttal established pursuant to subsections (b)(2) and (b)(3). Claimant responds in support of the administrative law judge's award of benefits and, on cross-appeal, contends that the administrative law judge erred in finding that the miner's death was not due to pneumoconiosis. Employer responds in support of the administrative law judge's finding that death was not due to pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds, declining to participate in these appeals.

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).

Employer first contends that the administrative law judge erred in refusing to comply with the Board's remand order by not providing adequate reasons for his decision not to reopen the record. Employer's Brief at 7-9. In the previous appeal, the Board noted that employer has not developed evidence under the standards enunciated by *Cort v. Director, OWCP*, 996 F.2d 1549, 17 BLR 2-166 (3d Cir. 1993) and *Carozza v. United States Steel Corp.*, 727 F.2d 74, 6 BLR 2-15 (3d Cir. 1984), and held that because the administrative law judge failed to explain his reasons for failing to allow the record to be reopened, the case must be remanded for the administrative law judge to provide such explanations. *Sinesky*, *supra*.

In his Order denying employer's Motion to Reopen the Record of October 12, 1995, the administrative law judge stated:

> This is not a case where reopening the record would allow new examinations or testing of the miner, for this miner is deceased. Moreover, there is no issue here which depends on determining the credibility of witnesses or hearing testimony. . . There is already a considerable amount of medical evidence in the record and I believe it is sufficient for me to apply the current legal standards on the issues before me. The decision as to whether to reopen the record on remand is within the province of the trial judge.

Order of October 12, 1995.

The decision as to whether to reopen the record on remand is within the province of the administrative law judge. *See* 20 C.F.R. §725.456(e); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989); *Toler v. Associated Coal Co.*, 12 BLR 1-49 (1989); *Borgeson v. Kaiser Steel Co.*, 12 BLR 1-169 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *White v. Director, OWCP*, 7 BLR 1-348, 1-351 (1988). In this case, in accordance with the Board's order on remand, the administrative law judge specifically stated that the medical evidence of record was sufficient for him to apply the current legal standard and explained why additional evidence would not be of assistance to him. Order of October 12, 1995. Thus, we affirm the administrative law judge's denial of employer's Motion to Reopen the Record.

Employer next contends that the administrative law judge erred in failing to find rebuttal established pursuant to subsection (b)(2). Employer's Brief at 10. In its Decision and Order of October 25, 1991, the Board held that there is no evidence of record sufficient to establish subsection (b)(2) rebuttal and reversed the administrative law judge's finding of rebuttal pursuant to subsection (b)(2). *Sinesky v. Mathies Coal Co.*, BRB No. 87-2632 BLA (Oct. 25, 1991)(unpub.). Thus, because the Board previously reversed the administrative law judge's finding pursuant to subsection (b)(2), and because no exception to the law of the case doctrine has been established, we hold that the Board's holding pursuant to subsection (b)(2) is the law of the case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Employer next contends that the administrative law judge erred in failing to find rebuttal established pursuant to subsection (b)(3). Employer's Brief at 10-15. Pursuant to subsection (b)(3), the administrative law judge found that the evidence established that pneumoconiosis did not contribute substantially to the miner's death, but that the evidence was insufficient to rebut the presumption that the miner was totally disabled due to pneumoconiosis at the time of his death, and thus,

insufficient to establish subsection (b)(3) rebuttal. Third Decision and Order on Remand at 2.

Rebuttal pursuant to subsection (b)(3), cannot be satisfied by proof that a claimant is not disabled or impaired. Instead, rebuttal under subsection (b)(3) must accept the assumption that claimant is totally disabled and proceed to address the source of the disability. *See Cort*, *supra.* In making his findings pursuant to subsection (b)(3), the administrative law judge properly noted that the Board held that the opinions of Drs. Kleinerman, Harnsbarger and O'Connor, none of whom opined that claimant was totally disabled, could not support a finding of rebuttal pursuant to subsection (b)(3). Third Decision and Order on Remand at 2; *Sinesky*, slip op. of May 31, 1995 at 5; Director's Exhibit 30; Employer's Exhibit 2; *Cort*, *supra; Brinkley*, *supra*. The administrative law judge further properly found that neither Dr. Zafar nor Dr. Kress opined that claimant was totally disabled. Third Decision and Order on Remand at 2; Director's Exhibits 17, 30.

Because the administrative law judge properly found that none of the physicians of record opined that claimant was totally disabled, we affirm the administrative law judge's finding that rebuttal is not established pursuant to subsection (b)(3) and the award of benefits.[1] Third Decision and Order on Remand at 2; Director's Exhibits 16-18, 30; Employer's Exhibits 1, 2; *Cort*, *supra*.

[1]Because we affirm the award of benefits, we need not address claimant's contentions on cross-appeal.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge