

BRB No. 94-4071 BLA

ESTIL VINSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Sheldon R. Lipson, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle), Pineville, West Virginia, for claimant.

Eileen McCarthy (Thomas S. Williamson, Jr., 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, the United States Department of Labor.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (87-BLA-1807) of

¹ Claimant is Estil Vinson, the miner, who filed a claim for benefits with the Social Security Administration (SSA) on August 10, 1970. Director's Exhibit 1. SSA considered and denied the claim four times. Director's Exhibits 33-36. The Department of Labor then reviewed the claim, which it administratively denied on July 28, 1980, Director's Exhibit 38, and in a Decision and Order issued on February

Administrative Law Judge Sheldon R. Lipson 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 second time. In *Vinson v. Director, OWCP*, BRB No. 92-1235 BLA (Oct. 7, 1993)(unpub.), the Board, citing *Marcum v. Director, OWCP*,

27, 1992.

11 BLR 1-23 (1987), upheld the administrative law judge's reliance on Dr. Thavaradhara's opinion of "no respiratory impairment," but vacated his finding pursuant to 20 C.F.R. §727.203(b)(3), remanding the case for the administrative law judge to consider two medical opinions and an exercise stress test that he had overlooked. The Board also instructed him to reconsider a pulmonary function study that he had mischaracterized as non-qualifying.²

On remand, the administrative law judge discredited the pulmonary function study because it had been invalidated and found the two medical opinions undocumented and unreasoned. Decision and Order on Remand at 1-2. He also considered the 1972 stress test to be unreflective of claimant's condition at the 1990 hearing, finding it outweighed by "the more convincing report furnished by Dr. Thavaradhara in 1988." Decision and Order on Remand at 2. Referring to his earlier Decision and Order, the administrative law judge concluded that "I have already found that [Dr. Thavaradhara's] report is far more consistent with [the] objective test results and is entitled to decisive weight." *Id.* Accordingly, he denied benefits.

On appeal, claimant challenges the legal sufficiency of Dr. Thavaradhara's opinion to establish rebuttal pursuant to Section 727.203(b)(3) in light of *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994).³ The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held in *Grigg* that if an administrative law judge finds the existence of pneumoconiosis established pursuant to Section 727.203(a)(1), he cannot credit at Section 727.203(b)(3) a medical opinion in which the physician's conclusion that claimant has no respiratory impairment is premised upon the physician's diagnosis of no pneumoconiosis. *Grigg*, 28 F.3d at 419, 18 BLR at 2-306. The Director responds, urging affirmance.⁴

The Board's scope of review is defined by statute. The administrative law

² The Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §727.203(a)(1), (b)(1), (2). *Vinson*, slip op. at 2 n.1.

³ *Grigg* was decided after the Board's Decision and Order was issued but before the administrative law judge's Decision and Order on Remand was issued.

⁴ We affirm as unchallenged on appeal the administrative law judge's findings regarding the pulmonary function study, the two medical reports, and the stress test. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

Dr. Thavaradhara's opinion was supported by findings from a physical examination, negative chest x-ray, pulmonary function and blood gas studies and a stress test, all of which the physician declared were "within normal limits." Director's Exhibit 46. He concluded that "based on these findings, I do not believe that [claimant] has any significant respiratory impairment or is suffering from pneumoconiosis." *Id.* In a supplemental report based on the same data, Dr. Thavaradhara stated that "[claimant] does not have any respiratory impairment." Director's Exhibit 51.

Claimant contends that Dr. Thavaradhara's opinion is insufficient to establish Section 727.203(b)(3) rebuttal under *Grigg* because the premise of his opinion is that claimant does not have pneumoconiosis, which is erroneous. Claimant's Brief at 4. Citing *Bailey v. Director, OWCP*, No. 93-1157 (4th Cir. Nov. 7, 1994)(unpub.), the Director contends that the record is clear that Dr. Thavaradhara did not premise his finding of no respiratory impairment upon his belief that claimant does not have pneumoconiosis, but rather upon the objective test results.⁵ Director's Brief at 1.

⁵ The claimant in *Bailey* argued that the administrative law judge erred in crediting a "no pulmonary impairment" opinion at Section 727.203(b)(3) because the physician's diagnosis of no pneumoconiosis was contrary to the administrative law judge's finding of invocation at Section 727.203(a)(1). The court rejected this argument, noting without discussion that "Dr. Zaldivar's finding of no pulmonary impairment was reached independently of his finding of no pneumoconiosis," and was supported by the objective study and physical exam results. Slip op. at 3. The court added that "it is not necessarily inconsistent to credit a physician's opinion

Thus, the Director argues that the opinion meets the requirements of *Grigg* and the administrative law judge's finding that rebuttal was established at Section 727.203(b)(3) must be affirmed. We disagree.

Because the determination of the premise of a physician's opinion is a factual finding committed to the trier of fact, we are not empowered to substitute our judgment for his. Hence, we vacate the administrative law judge's finding at Section 727.203(b)(3) and remand the case for him to consider the sufficiency of Dr. Thavaradhara's opinion to establish subsection (b)(3) rebuttal in light of *Grigg*. See *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Grigg, supra*; *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989). The administrative law judge did not mention *Grigg*, see n.3, and provided no explanation for his determination that Dr. Thavaradhara's opinion was credible in light of the administrative law judge's prior determination that claimant had established the existence of pneumoconiosis pursuant to Section 727.203(a)(1). Although the administrative law judge repeated his earlier conclusion that Dr. Thavaradhara's opinion is more consistent with the objective studies, he did not address the erroneous premise issue.

regarding one element [of a claim] while rejecting his view concerning another," because "pneumoconiosis is established on the basis of different data than the other critical elements" of a claim. *Id.* (citations omitted). While the court rejected claimant's contention on the application of *Grigg*, it remanded the case for the administrative law judge to consider all of the relevant evidence. Slip op. at 4.

Because the administrative law judge did not consider *Grigg* and did not make a finding that Dr. Thavaradhara's "no respiratory impairment" opinion was independent of his diagnosis of no pneumoconiosis, we remand the case for the administrative law judge to consider the physician's opinion in light of *Grigg*.⁶

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

_____ JAMES F.
BROWN
Administrative Appeals Judge

_____ REGINA C.
McGRANERY
Administrative Appeals Judge

⁶ Claimant contends that Dr. Thavaradhara's opinion should be discredited because the physician failed to explain his conclusion. Claimant's Brief at 4. We reject this contention because Dr. Thavaradhara stated that his opinion was based on the results of a physical examination, a chest x-ray, pulmonary function and blood gas studies, and a stress test, all of which he considered to be within normal limits and therefore supported his conclusion. Director's Exhibit 46.