BRB No. 96-1557 BLA

ALBERT A. BORDA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION 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 of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Gregory C. Hook (Hook & Hook), Waynesburg, Pennsylvania, for claimant.

William S. Mattingly and Kathy L. Snyder (Jackson & Kelly), Morgantown, West Virginia, for employer.

Jill M. Otte (J. Davitt McAteer, Acting 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 DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (92-BLA-0624) of Administrative Law Judge Edward Terhune Miller 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). The administrative law judge initially

rejected employer's contention that, inasmuch as claimant last worked as a federal coal mine inspector, he must first exhaust his potential remedy under the Federal Employee Compensation Act (FECA) before seeking compensation under the Act. The administrative law judge next found that claimant had filed a timely request for modification of the denial of his original claim pursuant to 20 C.F.R. §725.310, which the administrative law judge therefore found was still pending.[1] The administrative law

[1]Claimant originally filed a claim on January 30, 1978, while still working as a federal coal mine inspector and having previously worked as a coal miner until May, 1972. The claim was ultimately denied by the Department of Labor on August 4, 1980, Director's Exhibits 7, 45.

Subsequently, claimant wrote a letter dated July 31, 1981, to the district director, within a year of the denial, Director's Exhibit 45, stating, in part, that he was sorry that his claim was denied, inquiring whether he would be allowed to continue to work if he were awarded benefits under FECA and/or the Act and resubmitting evidence which he believed had been apparently lost by the Department of Labor. The Department of Labor notified claimant by letter dated September 27, 1982, that his claim file was being transferred from the Washington, D.C., office to the Parkersburg, West Virginia, office, *id*. No further action on claimant's original claim is contained in the record.

Claimant ultimately filed a second claim on April 26, 1988, Director's Exhibit 1, and a Notice of Claim, dated May 3, 1988, was sent to employer, Director's Exhibit 5. The second claim was denied as a duplicate claim under 20 C.F.R. Part 718 and 20 C.F.R. §725.309 by the Department of Labor on September 13, 1989, Director's Exhibit

judge rejected employer's contention that, inasmuch as employer did not receive notice of claimant's original claim, liability should transfer to the Black Lung Disability Trust Fund (Trust Fund).

In regard to the merits, the administrative law judge found employer's stipulation of thirty-five years of coal mine employment supported by the record and, inasmuch as claimant's original claim was filed in 1978, adjudicated the claim pursuant to 20 C.F.R. §727.203. Inasmuch as employer stipulated to the existence of pneumoconiosis based on the x-ray evidence of record, the administrative law judge found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(1) and, therefore, found rebuttal of the interim presumption precluded pursuant 20 C.F.R. §727.203(b)(4). Inasmuch as claimant retired as a federal coal mine inspector in April, 1987, prior to the hearing, the administrative law judge found that rebuttal of the interim presumption was not established pursuant to 20 C.F.R. §727.203(b)(1). Finally, the administrative law judge found that rebuttal was not established pursuant to 20 C.F.R. §727.203(b)(2)-(3). Accordingly, benefits were awarded.

On appeal, employer initially contends that the administrative law judge erred in finding that claimant had filed a timely request for modification of the denial of his original claim and, therefore, erred in adjudicating the instant claim pursuant to Section 727.203. Alternatively, employer contends that the delay between claimant's motion for modification and the administrative law judge's hearing, as well as employer's receiving notice of the instant claim, was unreasonable, violated the Administrative Procedure Act (APA), deprived employer of its due process rights and was prejudicial to employer. Thus, employer contends that liability in the instant case should transfer to the Trust Fund. Next, employer reiterates its contention made before the administrative law judge that, inasmuch as claimant last worked as a federal coal mine inspector, he should be required to first exhaust his remedies under FECA prior to proceeding against employer under the Act. Finally, employer contends that the administrative law judge ultimately erred in finding that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(3).

8, and ultimately referred to the Office of Administrative Law Judges for a hearing. The administrative law judge held a hearing in the instant case on March 1, 1994.

Claimant responds, urging that the administrative law judge's Decision and Order awarding benefits be affirmed, but, nevertheless, agreeing with employer's contention that liability in the instant case should transfer to the Trust Fund. The Director, Office of Workers' Compensation Programs, (the Director) also responds, urging the Board to affirm the administrative law judge's finding that claimant filed a timely request for modification of the denial of his original claim pursuant to Section 725.310 and, therefore, urges the Board to affirm the administrative law judge's finding that the instant claim should be adjudicated pursuant to Section 727.203. The Director also urges the Board to reject employer's contention that, in light of the delay between claimant's motion for modification and the administrative law judge's hearing, as well as employer's receiving notice of the instant claim, liability should transfer to the Trust Fund. Finally, the Director urges the Board to reject employer's contention that claimant should first exhaust his remedies under FECA prior to proceeding against employer under the Act. Employer has filed a reply brief, reiterating its contentions.[2]

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).

The administrative law judge found that claimant's letter dated July 31, 1981, constituted a timely request for modification of claimant's original claim, Director's Exhibits 7, 45, pursuant to Section 725.310 and the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Decision and Order at 4-5. Thus, the administrative law judge found that claimant's original claim was still pending, that claimant's second claim merged into his original claim pursuant to 20 C.F.R. §725.309(c) and that the instant claim should be adjudicated pursuant to Section 727.203. Employer contends that claimant's letter does not meet the criteria of a motion for modification under the Act and regulations. Thus, employer contends that claimant's second claim should be considered a duplicate claim pursuant to 20 C.F.R. §725.309(d), subject to adjudication under Part 718, and, therefore, contends that the administrative law judge erred in adjudicating the original claim on the merits pursuant to Section 727.203.

[2]Employer has also filed a request for oral argument in the instant case, *see* 20 C.F.R. §802.305. In light of the disposition of the instant case, herein, employer's request for oral argument is denied, *see* 20 C.F.R. §802.306.

The Board has not required the party seeking modification to use any specific language in doing so; rather, a claimant's expression of an intention to further pursue compensation under the Act has been deemed adequate to initiate the modification process. *See Madrid v. Coast Marine Construction Co.*, 22 BRBS 148, 152 (1989); *Searls v. Southern Ohio Coal Co.,* 11 BLR 1-161, 1-162-3 (1988); *see also Garcia v. Director, OWCP*, 12 BLR 1-24 (1988). Moreover, as the administrative law judge properly found, the Fourth Circuit court has held that if a claimant avers generally or simply alleges that the administrative law judge improperly found or mistakenly decided the ultimate fact and thus erroneously denied the claim, the [district director] (including his administrative law judge incarnation) has the authority, without more (*i.e., "*there is no need for a smoking gun factual error, changed conditions or startling new evidence"), to modify the denial of benefits, *see Jessee, supra*. Thus, contrary to employer's contention, claimant's letter, filed within one year of the last denial of his original claim, Director's Exhibit 45, was a timely request for modification which served to keep claimant's original claim open, viable and pending, *see* Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922(a), as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §§725.309(d), 725.310(a); *Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990); *Garcia, supra*; *see also Madrid, supra*; *Searls, supra*. *See generally Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14 (1992)*; Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Cole v. Director, OWCP*, 13 BLR 1-60 (1989). In addition, pursuant to the modification provisions, claimant's second claim is deemed merged into his original claim, with the filing date of the original claim as the controlling filing date, *see* 20 C.F.R. §725.310; *Stanley, supra; Garcia, supra; Tackett v. Howell and Bailey Coal Co.*, 9 BLR 1-181 (1986).

Alternatively, employer contends that the delay between claimant's 1981 motion for modification and the administrative law judge's 1994 hearing was unreasonable, violated the APA and deprived employer of its due process rights. Moreover, in light of the delay, employer contends that it did not receive timely notice of the viability of claimant's original claim until just prior to the hearing. Thus, employer contends that it should be dismissed from the claim pursuant to the APA, the doctrine of laches and/or the doctrine of equitable estoppel and that the Trust Fund should be held liable, inasmuch as employer contends that the Department of Labor was responsible for the delay. The administrative law judge rejected employer's contention that liability should transfer to the Trust Fund, finding no authority or prejudice identified by employer in support of such a transfer, Decision and Order at 4 n. 3.[3]

[3]Although the administrative law judge found that claimant's original claim was viable and subject to adjudication pursuant to Section 727.203, the administrative law judge noted that evidence relating to claimant's original claim was already part of the record and that the parties agreed that the testimony offered at the hearing would be the same regardless of which regulations apply, *see* Hearing Transcript at 16. Decision and Order at 4, n. 3. In addition the administrative law judge found that no showing was made by employer that additional discovery would be helpful, no continuance was requested by employer, no substantial prejudice was identified by employer at the

The Fourth Circuit court has held that a long delay in processing a claim did not constitute a violation of due process, *see Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299, 2-308 n. 7 (4th Cir. 1994). In addition, inasmuch as the Department of Labor is not required to notify an employer of a claim until after the initial determination of eligibility, the United States Court of Appeals for the Seventh Circuit has recently rejected as inappropriate the contention that delays in the administrative adjudication of a claim violated an employer's due process rights[4] so that liability for payment of benefits should transfer from the employer to the Trust Fund, *see Midland Coal Co. V. Director, OWCP [Kelly]*, No. 96-3564, F.3d , BLR (7th Cir., Jul. 17, 1997); *see also Peabody Coal Co. V. Holskey,* 888 F.2d 440, 13 BLR 2-95 (6th Cir. 1989); *U.S. Pipe & Foundry Co. V. Webb*, 595 F.2d 264, 2 BLR 2-7 (5th Cir. 1979). In the instant case, there was never an initial determination of eligibility prior to the case being referred to the Office of Administrative Law Judges for a hearing.

In regard to employer's contention that it should be dismissed pursuant to the doctrine of equitable estoppel in light of the delay in notifying employer of the viability of

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hearing and no prejudicial surprise or lack of preparation was observed by the administrative law judge at the hearing, *id*.

[4]Although employer cites to cases in which delay in administrative review has been found to be a violation of due process, the cases involve wrongful deprivation of benefits resulting from the delay, *see Fusari v. Steinberg*, 419 U.S. 379 (1974); *Air Line Pilots Ass'n Intern. V. Civil Aeronautics Bd.*, 750 F.2d 81 (D.C. Cir. 1984); *Kelly v. Railroad Retirement Board*, 625 F.2d 486 (3d Cir. 1980); *Silverman v. National Labor Relations Bd.*, 543 F.2d 428 (2d Cir. 1976); *White v. Matthews*, 434 F. Supp. 1252 (D. Conn. 1976). In the instant case, any delay in the adjudication of this claim deprived claimant, not employer, from receiving any potential benefits during that period and employer benefited from the delay to the extent that it did not have to pay any potential benefits during that period.

claimant's original claim, the party asserting estoppel must produce evidence of affirmative misconduct on the part of the Department of Labor, *i.e.*, more than negligence, *see Vahalik v. Youghiogheny & Ohio Coal Co.*, 15 BLR 1-43 (1991); *see also Reich v. The Youghiogheny and Ohio Coal Co.*, 66 F.3d 111, 19 BLR 2-345 (6th Cir. 1995)(an employer must show affirmative misconduct by the government in order to assert the doctrine of equitable estoppel against the Department of Labor). The Board has specifically held, however, that specific time constraints may not be placed on the Department of Labor's processing of claims in rejecting an administrative law judge's reliance on an equitable estoppel theory to support a transfer of liability from employer to the Trust Fund, *see Miller v. Alabama By-Products Corp.*, 11 BLR 1-42 (1988).

Consequently, inasmuch as the district director is under no duty to process claims within a specific time period, in order to establish that the Department of Labor and/or the district director failed to provide employer adequate notice of its potential liability on claimant's original claim, employer must demonstrate sufficient prejudice resulting from the delay in notification, *see* 20 C.F.R. §§725.410(d), 725.412; *Hoskins v. Shamrock Coal Co.*, 12 BLR 1-117 (1989); *see also Miller, supra*.[5] Similarly, in regard to employer's contention that holding employer liable should be time-barred pursuant to the doctrine of laches in light of the delay in notifying employer of the viability of

[5]Employer cites to two Wage Appeals Board cases to assert that showing delay alone may be enough to establish a violation of due process, without showing prejudice, *see In re Public Developers Corp.*, No. 95-02, 1994 WL 418893 (Jul. 29, 1994); *In re Slotnick Co.*, No. 80-05, 1983 WL 144666 (Mar. 22, 1983). Contrary to employer's contention, while the Wage Appeals Board in *Slotnick, supra,* stated in *dicta* that "extreme delay may create presumptions of improper treatment with or without the showing of palpable injury," the Board ultimately held that "[i]n the absence of a clear showing of sufficient injury or disadvantage caused by the delay, we believe it inappropriate to invoke a laches doctrine here." *See Slotnick, supra*. The Wage Appeals Board again required a showing of actual prejudice in *Public Developers, supra*. In any event, both Wage Appeals Board cases cited by employer involved proceedings under the Davis-Bacon Act, which are not relevant under the Act, herein.

claimant's original claim, the Fourth Circuit court has held that the defense of laches is sustainable only on proof of "prejudice to the party asserting the defense," *see Mogavero v. McLucas*, 543 F.2d 1081, 1083 (4th Cir. 1976).

Employer contends that the delay in providing it notice that claimant's original claim was viable until just prior to the hearing was prejudicial to employer inasmuch as it deprived employer the opportunity to frame its defense under Section 727.203(b), as opposed to Part 718, where claimant bears the burden of proof, which would be applicable if claimant's second claim was viable. Contrary to employer's contention, the Department of Labor is not required to notify an employer of a claim until after an initial determination of eligibility, *see* 20 C.F.R. §§725.410(d), 725.412; *Kelly*, *supra; see also Holskey, supra*; *Webb, supra*; *Hoskins, supra.* There was never an initial determination of eligibility in the instant case prior to the case being referred to the Office of Administrative Law Judges for hearing, when employer did receive notice of the claim in May of 1988, *see* Director's Exhibit 5. Moreover, employer admits that it received claimant's July, 1981, letter, found by the administrative law judge to constitute a motion for modification, *see Madrid, supra*; *Searls, supra*; *Garcia, supra,* when it was made part of the record in 1992, two years prior to the hearing. Employer's counsel further admitted at the hearing that after reviewing claimant's July, 1981, letter "in a different light," he could understand that claimant's 1978 claim was still viable, *see* Hearing Transcript at 14; *see also Vahalik, supra* (constructive notice is "information or knowledge of a fact imputed by law to a person, although he may not actually have such knowledge or information, because he could have discovered the fact by proper diligence and his situation was such as to cast upon him the duty of inquiring into it (quoting *Blacks Law Dictionary* 958 (5th Ed. 1979)); *Link v. Wabash*, 370 U.S. 630, 634 (1962)(a party generally is bound by the acts of his attorney and is considered to have "notice of all facts, notice of which can be charged upon the attorney"*); see also Consolidation Coal Co. V. Gooding*, 703 F.2d 230, 233 (6th Cir. 1983); *Howell v. Director, OWCP*, 7 BLR 1-259 (1984). Finally, even if there were no delay in the adjudication of the instant claim, Section 727.203 would apply even if the claim were adjudicated at the time of claimant's July, 1981, letter and, as the administrative law judge noted, employer admitted that the testimony it wished to offer at the hearing would be the same whether Section 727.203 or Part 718 applied, *see* Hearing Transcript at 16. Thus, inasmuch as employer had adequate notice of the instant claim, we affirm the administrative law judge's rejection of employer's contention that liability should transfer to the Trust Fund as supported by substantial evidence.[6]

[6]We also reject employer's contention that the delay between the hearing and the issuance of the administrative law judge's Decision and Order was prejudicial to employer, inasmuch as employer has not demonstrated any prejudice resulting from the delay in the issuance of the administrative law judge's Decision and Order, *see Worrell v. Consolidation Coal Co.*, 8 BLR 1-158, 1-162 (1985); *Williams v. Black Diamond Coal Mining Co.*, 6 BLR 1-188, 1-191 (1983). Contrary to employer's contention that the delay in the issuance of the administrative law judge's Decision and Order potentially left employer liable to pay interest for the period of the delay pursuant to 20 C.F.R.

§725.608, an employer is not liable for interest pursuant to Section 725.608 until it refuses or fails to pay benefits on the first determination of entitlement and there was no determination of entitlement in the instant case until the issuance of the administrative law judge's Decision and Order, *see* 20 C.F.R. §725.608.

Finally, employer contends that the delay in holding a hearing on claimant's 1981 motion for modification until March, 1994, prejudiced employer because it thereby precluded employer from establishing rebuttal pursuant to Section 727.203(b)(1), inasmuch as claimant did not retire from his job as a federal coal mine inspector until April, 1987. Section 727.203(b)(1) rebuttal can be established by showing that claimant is doing his usual coal mine work or comparable and gainful work, *see* 20 C.F.R. §727.203(b)(1), at the time of the hearing, *see Parks v. Director,* OWCP, 9 BLR 1-82 (1986); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982), but not if there are changed circumstances of employment indicative of a reduced ability to perform his usual coal mine work, in which case claimant is entitled to benefits so long as he terminates his employment within one year of the award, *see* 20 C.F.R. §727.205(a)-(c). Claimant worked as a coal miner until May, 1972, and then worked as a federal coal mine inspector until April, 1987, Director's Exhibits 1, 7, 45. Thus, claimant was still working as a federal coal mine inspector when he filed his original claim in 1978, Director's Exhibit 1, and at that the time of his motion for modification in 1981, Director's Exhibit 45, but was retired at the time of the hearing in this case in March, 1994.[7]

[7]While claimant lasted worked as a federal coal mine inspector, the Board has held that the work of a federal coal mine inspector can be found sufficient to establish that a claimant was performing his usual coal mine work in order to establish rebuttal under Section 727.203(b)(1), *see Bartley v. Director, OWCP*, 12 BLR 1-89 (1988)(Tait, J., concurring); *Uhl v. Consolidation Coal Co.*, 10 BLR 1-72 (1987). The Fourth Circuit court held in *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989), however, a case involving a claimant who worked as a coal miner in Pennsylvania and subsequently as a federal coal mine inspector in Virginia, that "all of claimant's coal mine employment and coal dust exposure occurred in Pennsylvania" and that "any coal dust exposure that claimant suffered while working for the federal government in

Virginia cannot qualify as an injury under the Black Lung Benefits Act," in holding that it did not have jurisdiction over the claim. In any event, even if, as may be inferred from the court's holding in *Kopp*, the work of a federal coal mine inspector is not sufficient to establish that a claimant was performing his usual coal mine work under Section 727.203(b)(1) in cases arising within the Fourth Circuit court's jurisdiction, rebuttal under Section 727.203(b)(1) may still be established by showing that claimant was doing comparable and gainful work as a federal coal mine inspector, *see* 20 C.F.R. §727.203(b)(1).

While it is pure speculation by employer whether claimant would have continued to work if a hearing had been scheduled earlier than when claimant retired in April, 1987, we note that, in any event, although an administrative law judge has jurisdiction to consider issues regarding whether an employer received adequate notice of any claim, *see Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992), employer did not specifically raise before the administrative law judge any issue of prejudice due to the delay in holding a hearing on claimant's 1981 motion for modification because the delay thereby precluded employer from establishing rebuttal pursuant to Section 727.203(b)(1).[8] Issues not effectively presented to an administrative law judge, where ample opportunity has been afforded, cannot be raised on appeal, *see Mullins v. Director, OWCP*, 11 BLR 1-132 (1988)(*en banc*)(Ramsey, C.J., dissenting), *reversing* 7 BLR 1-561 (1984)(Ramsey, C.J., concurring on this issue)(Smith, J., dissenting); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199 (1984). Thus, we decline to consider employer's contention that it was prejudiced due to the delay in adjudicating claimant's original claim because rebuttal pursuant to Section 727.203(b)(1) was, thereby, precluded. Consequently, we reject employer's contention that it was prejudiced by the delay in providing employer notice of claimant's motion for modification and/or that claimant's first claim was still viable and that it should be dismissed from the claim pursuant to the doctrines of laches and equitable estoppel.

Next, the administrative law judge rejected employer's contention that, inasmuch as claimant last worked as a federal coal mine inspector, he must first exhaust his potential remedy under FECA, 5 U.S.C. §§8101-8193, pursuant to the doctrine of exhaustion of remedies, prior to proceeding against employer under the Act, finding the authorities cited by employer did not require such a result and finding the doctrine of exhaustion of administrative remedies inapposite. Decision and Order at 3-4. Employer reiterates its contention on appeal, herein, contending that, pursuant to the doctrines of exhaustion of remedies and ripeness, claimant should seek the avenue of relief nearest and simplest first, which employer contends would be from claimant's most recent employer, the Department of Labor, under FECA. Moreover, inasmuch as an award for total disability due to pneumoconiosis under FECA would reduce the amount of an award under the Act, *see* 20 C.F.R. §725.533(a)(1); *Kopp, supra; Eastern Associated Coal Corp. V. Director, OWCP [Patrick]*, 791 F.2d 1129, 9 BLR 2-38 (4th Cir. 1986); *see also Sammons v. Wolf Creek Collieries*, 19 BLR 1-24 (1994), employer contends that without pursuing a claim under FECA, the amount of any potential benefits to be awarded under the Act can not be calculated. Finally, employer notes that the Director, also responsible for the administration of claims under FECA, did not alternatively

[8]Employer merely contended in its post-hearing brief to the administrative law judge that Section 727.203(b)(1) [*sic*], *see* 20 C.F.R. §727.205(c), would prohibit claimant from receiving any benefits until after the date claimant retired, *i.e.*, that claimant could not receive benefits for any period during which he was employed in the mines.

consider claimant's July, 1981, letter, in which claimant also inquired whether he should file a FECA claim, *see* Director's Exhibit 45, as the filing of a FECA claim. Thus, employer contends that the Department of Labor has a conflict of interest, inasmuch as it only acted on claimant's claim against employer under the Act, but not claimant's attempt to file a FECA claim against the Department of Labor. Employer therefore contends that the Department of Labor should have held claimant's claim under the Act in abeyance pending the resolution of claimant's efforts to obtain benefits under FECA.

Pursuant to the doctrine of exhaustion of administrative remedies, where an administrative remedy provided by statute exists, relief must first be sought by exhausting such remedies before the courts will act, *see Black's Law Dictionary* (5th Ed. 1979), *citing McKart v. U.S.*, 395 U.S. 185 (1969). Thus, the purpose of the doctrine of exhaustion of remedies is to allow administrative agencies the opportunity to fully adjudicate claims under their jurisdiction without concern of federal court interference, but does not require that only one administrative claim be pursued at any given time, unless specifically set forth in the relevant statute. The Act does not require that all other federal remedies be pursued first, prior to seeking benefits under the Act, but only requires that, for Part B claims, claimant file an "applicable State workers' compensation law" claim, 30 U.S.C. §923(c); 20 C.F.R. §725.403.

In addition, the Board has held that "the Act does not limit or condition its applicability on the basis of other existing parallel statutes," *see Roberson v. Norfolk & Western Railway Co.*, 13 BLR 1-6 (1989), *aff'd*, 918 F.2d 1144 (4th Cir. 1990), *cert. denied* 500 U.S. 916 (1991)(the existence of other federal remedial statutes is not conclusive as to whether railroad workers may also be considered miners under the Act,"); *see also Sammons, supra* (the purpose of FECA, to provide compensation for federal employees injured on the job, is different from that of the Black Lung Act, the purpose of which is to compensate coal miners who are totally disabled from pneumoconiosis arising out of coal mine employment).[9] Moreover, in holding that a federal coal mine inspector's "exclusive remedy" against the federal government for on-the-job injury due to coal dust exposure during the claimant's job as a federal coal mine inspector was through FECA, not through the Act, inasmuch as the federal government is not a responsible operator under the Act, *see Kopp, supra; Patrick, supra*; *see also* 5 U.S.C. §8116(c), the Fourth Circuit court did not preclude the claimant from also seeking a remedy for any injury due to prior coal dust exposure during the claimant's previous job as a coal miner against his previous employer under the Act, nor did the court require such a claimant to fully exhaust his remedies under FECA prior to filing a claim under the Act.[10] Thus, contrary to employer's contention that the Department of

[9]In *Sammons, supra*, the Board held that an award of benefits under FECA does not require an offset of a claimant's federal black lung benefits where the claimant's award under FECA was not based on total disability due to pneumoconiosis, *see* 20 C.F.R. §§725.533, 725.535; *see also* 20 C.F.R. §410.515.

[10]The court in *Patrick* noted, without further comment, that the claimant had filed

Labor should have held claimant's claim under the Act in abeyance pending the resolution of claimant's efforts to file a claim under FECA, a claimant can pursue claims under both FECA and the Act at the same time. Moreover, employer's contention, on the one hand, that it was prejudiced by the delay in the Department of Labor's adjudication of claimant's original claim is irrationally inconsistent with its contention, on the other hand, that the Department of Labor should have held claimant's claim under the Act in abeyance, *see Burton v. Drummond Coal Co.*, 7 BLR 1-194, 1-196 (1984). Consequently, we reject employer's contention and affirm the administrative law judge's finding that claimant need not exhaust his remedy under FECA prior to filing a claim under the Act.

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claims under both the Act and FECA, while merely holding that any benefits claimant received pursuant to his FECA claim would reduce the amount of benefits that the employer would potentially have to pay pursuant to the claimant's claim under the Act, *see Patrick, supra*.

Finally, in regard to the administrative law judge's findings on the merits, employer contends that the administrative law judge erred in applying the wrong standard under Section 727.203(b)(3) and in finding that none of the relevant medical opinion evidence was sufficient to establish rebuttal under subsection (b)(3).[11] In order to establish rebuttal pursuant to subsection (b)(3), in this case arising within the jurisdiction of the Fourth Circuit court, employer must rule out the causal relationship between the miner's total disability and his coal mine employment, *see Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *see also Phillips v. Jewell Ridge Coal Co.*, 825 F.2d 408, 10 BLR 2-160 (4th Cir. 1987).

The administrative law judge stated that the Fourth Circuit court held in *Grigg, supra*, that the standard in *Massey* is satisfied only where the relevant medical opinion states, without equivocation, that the miner suffers no respiratory or pulmonary impairment of any kind, Decision and Order at 8. Ultimately, the administrative law judge found that, inasmuch as none of the medical opinions of record unequivocally opined that claimant is not suffering from any respiratory or pulmonary impairment of any kind, employer failed to establish rebuttal under subsection (b)(3), Decision and Order at 31.

As employer contends, however, the Fourth Circuit court did not hold in *Grigg, supra*, that the standard in *Massey* is satisfied only by medical opinions finding no respiratory or pulmonary impairment of any kind. The court held that, while the standard enunciated in *Massey* is the law of the circuit, the logic of the Board's holding in *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987), *i.e.*, that an opinion finding no respiratory or pulmonary impairment is sufficient to establish rebuttal under subsection (b)(3), can satisfy the standard enunciated in *Massey* only where the relevant medical opinion states, without equivocation, that the miner suffers no respiratory or pulmonary impairment of any kind, and, furthermore, only in cases where the interim presumption is invoked under Section 727.203(a)(1) and where the physician rendering the opinion has not premised it on a erroneous finding that the claimant does not suffer from pneumoconiosis, *see Grigg, supra*; *see also Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Johnson v. Old Ben Coal Co.*, 17 BLR 1-5 (1992); *Baldwin v. Oakwood Red Ash Coal Corp.*, 14 BLR 1-23 (1990)(*en banc*); *Marcum, supra*. The court further stated that such opinions are more persuasive if they also identify what the physician considers the actual cause or causes of the miner's disability, *see Grigg, supra*. Consequently, contrary to the administrative law judge's characterization of the court's holding in *Grigg*, while a physician's opinion finding no respiratory or pulmonary impairment of any kind can satisfy the standard enunciated in

[11]Inasmuch as employer does not challenge the administrative law judge's findings that invocation of the interim presumption was established pursuant to Section 727.203(a)(1) and that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(1)-(2), (4), the administrative law judge's findings are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Massey, *see Grigg, supra*, a physician's opinion finding some respiratory or pulmonary impairment or disability is not necessarily insufficient to establish rebuttal pursuant to the standard enunciated in *Massey* if, as employer contends, the physician nevertheless rules out a causal relationship between the impairment or disability and the miner's coal mine employment, *see Massey, supra.* Inasmuch as the administrative law judge's findings that none of the medical opinion evidence of record is sufficient to establish rebuttal pursuant to subsection (b)(3) is, in any event, affirmable pursuant to the standard enunciated in *Massey*, as discussed *infra*, any error by the administrative law judge in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The administrative law judge considered the relevant medical opinion evidence of record and ultimately credited the opinion of Dr. Abrahams, who found that claimant was totally disabled due to coal workers' pneumoconiosis, Director's Exhibits 9, 12, 17, 27, 45; Hearing Transcript at 31-86, over opinions from Drs. Renn, Fino, Rasmussen, Dahhan and Devabhaktuni.[12] Employer contends that the administrative law judge

[12]Although, as claimant notes, the administrative law judge did not consider the opinion of Dr. Hunter, who diagnosed pneumoconiosis without a high degree of ventilatory abnormality, Director's Exhibits 4, 45, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), inasmuch as Dr. Hunter did not address and/or rule out any causal

erred in finding the opinions from Drs. Renn, Fino, Rasmussen, Dahhan and

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relationship between claimant's total disability and his coal mine employment, *see Massey, supra*, his opinion is insufficient to establish rebuttal pursuant to subsection (b)(3). Thus, any error by the administrative law judge in this regard is harmless, *see Larioni, supra*.

In addition, the administrative law judge properly found that the opinion of Dr. Lobl, who found that claimant had a moderate impairment, but could not state whether it was all due to pneumoconiosis or whether claimant was disabled, Director's Exhibits 4, 21, was insufficient to rule out a causal relationship between claimant's disability and coal mine employment, *see Massey, supra*, Decision and Order at 8. Finally, the administrative law judge also gave little weight to the opinion of Dr. Levine, who found claimant totally disabled due to coal workers' pneumoconiosis based on claimant's symptoms and history, despite normal pulmonary function study results and not conducting a blood gas study, Employer's Exhibit 7; Claimant's Exhibit 1, as not well documented or reasoned, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and inasmuch as Dr. Levine was a board-certified allergist, not a pulmonary specialist as were other physicians who provided opinions of record, *see Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990), Decision and Order at 15, 29-30. Inasmuch the administrative law judge's finding in regard to Dr. Levine's opinion is not challenged on appeal, it is affirmed, *see Skrack, supra*.

Devabhaktuni, whose opinions employer contends are better supported by the objective evidence of record, insufficient to establish rebuttal under subsection (b)(3).

In a 1990 report, Dr. Renn found claimant's pulmonary function study results normal with the exception of moderate midflow reduction, diagnosed pneumoconiosis without physiologic impairment and stated that claimant did "not have significant ventilatory impairment" and was not totally disabled, Director's Exhibit 18. Subsequently, in a 1992 deposition, Dr. Renn testified that there was no evidence of pulmonary or respiratory impairment caused by coal workers' pneumoconiosis, Employer's Exhibit 2; *see also* Employer's Exhibit 6. Although employer contends that the administrative law judge improperly interpreted Dr. Renn's 1990 medical opinion as a finding of impairment, the administrative law judge properly found that Dr. Renn's 1990 opinion merely stated that claimant does not suffer from a "significant" impairment, Director's Exhibit 18, not that claimant suffers from no respiratory or pulmonary impairment of any kind, *see Grigg, supra; see also Curry v. Beatrice Pocahantas Coal Co.*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995). Thus, the administrative law judge found Dr. Renn's 1990 opinion finding moderate midflow reduction and no "significant" impairment inconsistent with his subsequent opinion that claimant had no respiratory or pulmonary impairment and, therefore, found his opinion equivocal overall, Decision and Order at 12. It is within the administrative law judge's discretion to discredit an opinion which he finds equivocal, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988), and/or inconsistent, *see Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984). Consequently, we affirm the administrative law judge's discrediting of Dr. Renn's opinion under subsection (b)(3).

In regard to Dr. Fino's opinion, Dr. Fino reviewed the evidence of record and found no respiratory impairment or pulmonary disability due to pneumoconiosis or coal dust inhalation, Director's Exhibit 30; Employer's Exhibits 1, 3-4; Hearing Transcript at 108-144. The administrative law judge found, however, that the lower range used by Dr. Fino to find the results of claimant's objective test results to be normal, *i.e.,* as low as 68% of the predicted normal values based on a 95% confidence interval, *see* Hearing Transcript at 112-118, was lower than that used by the equally qualified Dr. Abrahams, who found claimant totally disabled due to pneumoconiosis, and Dr. Renn. Decision and Order at 27-28, 28-29. Dr. Abrahams found results falling below 80% of predicted normal values to be abnormal based on guidelines provided by the American Medical Association (AMA), *see* Director's Exhibit 27; Hearing Transcript at 47-48, 72, and Dr. Renn found results falling below 77% of predicted normal values to be abnormal, *see* Employer's Exhibit 2. Thus, the administrative law judge found Dr. Fino's opinion not wholly convincing or unequivocal when weighed against the opinions of the other equally qualified physicians of record and, therefore, gave his opinion less weight.

Employer contends that the standards used by Dr. Fino when reviewing claimant's objective test results are widely accepted and recommended and that the pulmonary function study results of record support Dr. Fino's opinion. Employer also

contends that the administrative law judge selectively analyzed Dr. Fino's opinion by focusing on his findings regarding claimant's objective test results, but did not subject Dr. Abraham's opinion to the same analysis.

Contrary to employer's contentions, the administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record and draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.,* 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, inasmuch as the administrative law judge's function is to resolve the conflicts in the medical evidence, *see Lafferty, supra; Fagg, supra*, and an administrative law judge may reasonably question the validity of a physician's opinion, such as Dr. Fino's, that varies significantly from the other medical opinions of record, *see Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986),[13] we affirm the administrative law judge's discrediting of Dr. Fino's opinion under subsection (b)(3).

Next, the administrative law judge found that Dr. Rasmussen's opinion did not rule out any respiratory or pulmonary impairment and therefore was insufficient to establish rebuttal under subsection (b)(3), Decision and Order at 12, 30. Dr. Rasmussen initially reviewed Dr. Renn's and Dr. Abraham's blood gas study results and stated he felt claimant had a minimal impairment in diffusion capacity, Director's Exhibit 45. Dr. Rasmussen later examined claimant, diagnosed coal workers' pneumoconiosis, but found "essentially normal" respiratory functional capacity and stated that claimant "appears" to have had "no significant loss" of respiratory function due to his coal workers' pneumoconiosis, *id*.

Employer contends that the administrative law judge improperly interpreted Dr. Rasmussen's medical opinion as a finding of a pulmonary impairment. Although Dr. Rasmussen did find some minimal impairment, Dr. Rasmussen's opinion is not necessarily insufficient, on that basis, to establish rebuttal pursuant to the standard enunciated in *Massey, supra*. Inasmuch as Dr. Rasmussen merely stated that claimant has "essentially normal," and/or "appears" to have had "no significant loss" of, respiratory function due to his coal workers' pneumoconiosis, Director's Exhibit 45, however, Dr. Rasmussen does not address and/or rule out any causal relationship between claimant's total disability and his coal mine employment in order to support

[13]A physician may rely on the AMA standards for evaluating respiratory impairment, such as the lower range of 80% of predicted normal values to find objective test results abnormal as relied on by Dr. Abrahams, *see* AMA *Guides to the Evaluation of Permanent Impairment*, in formulating an opinion on disability, *see Vargo v. Valley Camp Coal Co.*, 7 BLR 1-901 (1985); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

rebuttal under subsection (b)(3), *see Massey, supra; see also Curry, supra; Grigg, supra.* Thus, any error by the administrative law judge in his weighing of Dr. Rasmussen's opinion under subsection (b)(3) is harmless, *see Larioni, supra*.

Similarly, Dr. Dahhan does not address and/or rule out any causal relationship between claimant's total disability and his coal mine employment, *see Massey, supra.* Dr. Dahhan reviewed the medical evidence, diagnosed pneumoconiosis and opined that, even if he accepted the possibility that claimant's blood gas study results showed some desaturation in hemoglobin during exercise, in light of claimant's normal pulmonary function study, lung volume and diffusion capacity results, claimant was not totally disabled from a respiratory standpoint, Employer's Exhibit 5. The administrative law judge gave less weight to Dr. Dahhan's opinion inasmuch as he did not examine claimant and did not totally dismiss the possibility that claimant suffered from some desaturation in hemoglobin during exercise, Decision and Order at 30.

Employer contends that the administrative law judge mechanically accorded less weight to Dr. Dahhan's opinion inasmuch as he was a non-examining physician and that the administrative law judge improperly interpreted Dr. Dahhan's medical opinion as a finding of a pulmonary impairment. Although Dr. Dahhan did not examine claimant and may have found some desaturation in hemoglobin during exercise, his opinion is not necessarily insufficient, for those reasons alone, to establish rebuttal pursuant to the standard enunciated in *Massey, supra; see also Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989). Nevertheless, inasmuch as Dr. Dahhan does not address and/or rule out any causal relationship between claimant's total disability and his coal mine employment, *see Massey, supra,* any error by the administrative law judge in weighing Dr. Dahhan's opinion under subsection (b)(3) is harmless, *see Larioni, supra*.

Finally, the administrative law judge found Dr. Devabhaktuni's opinion insufficient to establish rebuttal under subsection (b)(3) inasmuch as his qualifications were not of record and there was no indication that he performed any objective tests upon claimant on which to base his opinion, Decision and Order at 29. Dr. Devabhaktuni found that claimant suffered from a cardiac impairment due to coronary artery disease, but also found claimant's exercise stress test showed severe desaturation indicating some degree of interstitial lung disease most likely related to coal workers' pneumoconiosis, Director's Exhibit 45. Although an administrative law judge may not discredit a physician's opinion because the physician did not perform objective medical tests, *see Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibralter Coal Corp.*, 6 BLR 1-1291 (1984), an administrative law judge may give less weight to a physician's opinion when the physician or the record does not provide his qualifications, *see Kendrick v. Kentland-Elkhorn Coal Corp.*, 5 BLR 1-730, 1-733 (1983). Thus, inasmuch as the administrative law judge provided another valid, alternative reason for discrediting Dr. Devabhaktuni's opinion and, in any event, Dr. Devabhaktuni does not address and/or rule out any causal relationship between claimant's total disability and his coal mine employment, *see Massey, supra,* any error by the administrative law judge in discrediting his opinion because he did not perform objective medical tests is harmless,

see Searls v. Southern Ohio Coal Co., 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378 (1983); *see also Larioni, supra*.

The administrative law judge ultimately found the opinion of Dr. Abrahams that claimant was totally disabled due to coal workers' pneumoconiosis was reasoned and documented, *see Fields, supra; Lucostic, supra*, and, properly, insufficient to establish rebuttal pursuant to subsection (b)(3), Decision and Order at 19-20. Although employer contends that the administrative law judge erred in crediting Dr. Abrahams' opinion, inasmuch as the administrative law judge permissibly, within his discretion, discredited the opinions from Drs. Renn and Fino and, furthermore, the opinions of Drs. Rasmussen, Dahhan and Devabhaktuni are insufficient to establish rebuttal pursuant to subsection (b)(3), *see Massey, supra*, any error by the administrative law judge in weighing Dr. Abrahams opinion is harmless, *see Larioni, supra*. Thus, we affirm the administrative law judge's finding that the relevant medical opinion evidence is insufficient to establish rebuttal under Section 727.203(b)(3).

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge