

BRB No. 96-1755 BLA

BARBARA STILTNER)		
(Widow of GROVER H. STILTNER))		
)		
Claimant-Petitioner)		
)		
v.)		
)		
J & M COAL COMPANY)		
)	DATE	ISSUED:
Employer-Respondent)		
)		
)		
DIRECTOR, OFFICE OF WORKERS')		
COMPENSATION PROGRAMS, UNITED)		
STATES DEPARTMENT OF LABOR)		
)		
Party-in-Interest)	DECISION and ORDER	

Appeal of the Decision and Order of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Gerald F. Sharp (Browning, Lamie & Sharp), Grundy, Virginia, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (93-BLA-1247) of Administrative Law Judge Henry B. Lasky denying benefits on claims filed by the miner and survivor 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). In its most recent Decision and Order, the Board affirmed the administrative law judge's findings that claimant established modification

¹Claimant is Barbara Stiltner, the miner's widow. The miner, Grover H. Stiltner, filed a claim for benefits on November 30, 1979 and died on December 21, 1991. Director's Exhibit 1, 88. Claimant filed a survivor's claim on June 1, 1992. Director's Exhibit 95.

pursuant to 20 C.F.R. §725.310, that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2), (3), that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1)-(3). The Board vacated the administrative law judge's finding that claimant established invocation pursuant to Section 727.203(a)(1) and that employer failed to establish rebuttal pursuant to Section 727.203(b)(4) and remanded the claim for further consideration of the evidence pursuant to subsections (a)(1) and (b)(4) and pursuant to 20 C.F.R. §718.205, if entitlement is not established pursuant to 20 C.F.R. Part 727. *Stiltner v. J & M Coal Co.*, BRB No. 94-0798 BLA (Nov. 8, 1995)(unpub.).

On remand, the administrative law judge found that claimant failed to establish invocation of the interim presumption pursuant to subsection (a)(1), that employer established rebuttal pursuant to subsection (b)(4), that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and that claimant did not establish invocation of the irrebuttable presumption found at 20 C.F.R. §718.304. Accordingly, benefits were denied on both the miner's and the survivor's claims.

In the instant appeal, claimant contends that the administrative law judge erred in finding that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(4) in light of the Board's affirmance of the administrative law judge's finding that employer failed to establish rebuttal at Section 727.203(b)(3). Claimant's counsel has also filed a fee petition. Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate.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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. Claimant's only contention on appeal is that, because the Board affirmed the administrative law judge's finding that employer failed to establish rebuttal pursuant to subsection (b)(3), employer is precluded from establishing rebuttal pursuant to subsection (b)(4). We disagree. Section 727.203(b) provides four alternate methods of rebutting the interim presumption. The party opposing

²We affirm the administrative law judge's findings pursuant to 20 C.F.R. §§727.203(a)(1), 718.205(c), and 718.304 as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

entitlement may rebut the presumption by showing that: 1) the miner is doing his usual coal mine employment or comparable and gainful work; or 2) the miner is able to do his usual coal mine employment or comparable and gainful work; or 3) the miner's total disability or death did not arise out of coal mine employment; or 4) the miner does not or did not have pneumoconiosis. 20 C.F.R. §727.203(b)(1), (2), (3), (4). In determining whether or not the interim presumption has been rebutted, the administrative law judge must consider all relevant evidence. 20 C.F.R. §727.203(b); *York v. Benefits Review Board*, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424, 8 BLR 2-109 (4th Cir. 1986)(en banc), *rev'd on other gr'ds, Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 108 S.Ct. 427, 11 BLR 2-1 (1987); *Alabama By-Products v. Killingsworth*, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1985); *White v. Valley Camp Coal Co.*, 7 BLR 1-472 (1984); *Hill v. Drummond Coal Co.*, 6 BLR 1-1143 (1984). If the administrative law judge finds the interim presumption invoked, he must provide a thorough analysis of all relevant evidence in light of the appropriate legal standards applicable to each of the rebuttal methods set forth in 20 C.F.R. §727.203(b). *Hill v. Drummond Coal Co.*, 6 BLR 1-1143 (1984); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984); *New v. Director, OWCP*, 6 BLR 1-597 (1983).

Contrary to claimant's contention, employer's failure to establish subsection (b)(3) rebuttal does not preclude it from rebutting the interim presumption by showing that claimant does not have pneumoconiosis. The administrative law judge's finding that employer failed to establish subsection (b)(3) rebuttal means that employer is not able to rule out any relationship between the miner's disability and his coal mine employment. See *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). Claimant suggests that the finding of no rebuttal pursuant to Section 727.203 (b)(3) also means that claimant has established that the miner's respiratory disability is related to his coal mine employment, and thus, the existence of pneumoconiosis. This is not the case. Such an interpretation would be contrary to the United States Supreme Court's holding in *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 15 BLR 2-155 (1991), which upholds the validity of both subsection (b)(3) and (b)(4) rebuttal. Although the administrative law judge found rebuttal established at subsection (b)(3), that employer failed to rule out any relationship between the miner's disability and his coal mine employment, the administrative law judge did rationally find that employer established that the miner does not have pneumoconiosis pursuant to subsection (b)(4). Decision and Order at 9; see *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Further, because claimant makes no arguments regarding the administrative law judge's weighing of the evidence at (b)(4), we affirm the administrative law judge's finding of rebuttal pursuant to Section 727.203(b)(4) and the denial of benefits. See *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Finally, claimant's counsel has submitted an attorney's fee petition requesting a fee of \$750.00 for seven and one-half hours of service at an hourly rate of \$100.00. However, in order to receive compensation for legal services performed on a claimant's behalf, counsel must successfully prosecute the claim. 30 U.S.C. §928(a), as incorporated 30

U.S.C. §932(a); *Yates v. Harman Mining Co.*, 12 BLR 1-175 (1989), *reaff'd on recon. en banc*, 13 BLR 1-56 (1989); *Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987). Thus, because we affirm the denial of benefits on this claim, counsel's fee petition is denied.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed and claimant's counsel's requested attorney fee is denied.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge