BRB Nos. 00-0937 BLA
and 00-0937 BLA-A

JAMES E. COOLEY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Dan Rowland, Prestonsburg, Kentucky, for claimant.

Natalie D. Brown and Martin E. Hall (Jackson & Kelly PLLC), Lexington, Kentucky, for employer.

Helen H. Cox (Judith E. Kramer, 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, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order - Denial of Benefits (99-BLA-1082) of Administrative Law Judge Daniel J. Roketenetz 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).[1] This case involves a request for modification of the denial of a claim filed on October 2, 1978. In a Decision and Order dated January 30, 1984, Administrative Law Judge Donald W. Mosser credited claimant with twenty-five years of coal mine employment, and considered the claim under the applicable regulations at 20 C.F.R. Part 727. Judge Mosser determined that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Judge Mosser further determined, however, that the evidence was sufficient to establish rebuttal of the interim presumption under 20 C.F.R. §727.203(b)(2). Judge Mosser also found that claimant failed to establish entitlement to benefits pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, Judge Mosser denied benefits. Claimant appealed, challenging Judge Mosser's finding under Section 727.203(b)(2), and contending that Judge Mosser erred by not finding him entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The Board rejected claimant's contentions, and affirmed the denial of benefits. *Cooley v. Island Creek Coal Co.*, BRB No. 84-0386 BLA (Mar. 19, 1987), (McGranery, J., dissenting)(unpublished).

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Claimant thereafter filed an appeal with the United States Court of Appeals for the Sixth Circuit.[2] The court vacated the Board's Decision and Order, and remanded the case for further consideration of the evidence pursuant to Section 727.203(b)(2) consistent with the court's decision in *York v. Benefits Review Board*, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987).[3] *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). In a Decision and Order on Remand dated March 24, 1989, Judge Mosser found the evidence insufficient to establish rebuttal of the interim presumption under Section 727.203(b)(2) in light of *York*. Judge Mosser further determined that employer failed to establish rebuttal of the interim presumption under 20 C.F.R. §727.203(b)(3) and (b)(4). Accordingly, Judge Mosser awarded benefits on remand. Employer appealed, contending that Judge Mosser erred in failing to reopen the record on remand, and in not finding rebuttal established under Section 727.203(b)(2) and (b)(3). The Board vacated Judge Mosser's findings under subsections (b)(2) and (b)(3), and remanded the case for a reopening of the record and for reconsideration of the evidence under Section 727.203(b)(2) and (b)(3).[4] *Cooley v. Island Creek Coal Co.*, BRB No. 89-1402 BLA (Sept. 17, 1993)(unpublished). Claimant filed a Motion for Reconsideration of the Board's Decision and Order, and the Board denied the requested relief. *Cooley v. Island Creek Coal Co.*, BRB No. 89-1402 BLA (Sept. 27, 1996)(unpublished Decision and Order on Recon.).

Judge Mosser reopened the record, allowing the parties to submit additional evidence pursuant to the Board's remand instructions. In a Decision and Order on Remand dated November 3, 1997, Judge Mosser found that employer failed to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(2). Judge Mosser further found, however, that employer established rebuttal pursuant to Section 727.203(b)(3). Accordingly, Judge Mosser denied benefits. Claimant filed an appeal with the Board, but subsequently requested that the Board remand the case to the district director for modification proceedings. In an Order dated September 1, 1998, the Board granted claimant's request, dismissing claimant's appeal and remanding the case to the district director for consideration of

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[2]Because the miner's coal mine employment occurred in Kentucky, the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3]The Sixth Circuit upheld the Board's rejection of claimant's contention that he was entitled to the irrebuttable presumption of total disability under 30 U.S.C. §921(c)(3). *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988).

[4]The Board affirmed, as unchallenged on appeal, Judge Mosser's finding that rebuttal was not established pursuant to 20 C.F.R. §7272.203(b)(4). *Cooley v. Island Creek Coal Co.*, BRB No. 89-1402 BLA (Sept. 17, 1993)(unpublished).

claimant's petition for modification. *Cooley v. Island Creek Coal Co.*, BRB No. 98-0696 BLA (Sept. 1, 1998)(unpublished Order).

The district director denied modification on November 9, 1998, and the case was referred to Administrative Law Judge Daniel J. Roketenetz (the administrative law judge), who held a hearing on November 30, 1999. In his Decision and Order dated May 15, 2000, the administrative law judge credited claimant with twenty-five years of coal mine employment, and properly considered the claim pursuant to 20 C.F.R. Part 727. The administrative law judge stated that he was incorporating Judge Mosser's summary of the previously submitted evidence of record. The administrative law judge found, after stating that he reviewed Judge Mosser's Decision and Order dated November 3, 1997, that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge then determined that the evidence submitted on modification was sufficient to establish invocation of the interim presumption under Section 727.203(a)(1), and rebuttal of the presumption under Section 727.203(b)(3). The administrative law judge thus found that claimant failed to establish a change in conditions under Section 725.310 (2000) and, accordingly, denied benefits. On appeal, claimant's sole, specific contention is that the administrative law judge improperly discounted Dr. Sundaram's opinion, indicating that claimant is totally disabled due, in part, to pneumoconiosis. Employer responds in support of the administrative law judge's finding that rebuttal was established under Section 727.203(b)(3), but has additionally filed a cross-appeal, challenging the administrative law judge's finding that invocation was established under Section 727.203(a)(1). The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating he does not presently intend to file a response brief in either appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule in an Order issued on March 16, 2001, to which employer and the Director have responded.[5] As employer and the Director note, the revised regulations governing

[5]Claimant has not responded to the Board's Order issued on March 16, 2001. Pursuant to the Board's instructions, the failure of a party to submit a brief within twenty days following receipt of the Board's Order issued on March 2, 2001 would be construed as a position that the challenged regulations will not affect the outcome of this case.

modification of claims apply only to claims filed after January 19, 2001.[6] In addition, the Director properly recognizes that the regulations applicable in the instant case, *i.e.*, the regulations at 20 C.F.R. Part 727, have not been amended. Having considered the briefs submitted by the Director and employer and having reviewed the record, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

[6]Employer also contends that the amended regulations at 20 C.F.R. Part 718 governing the issues of the definition of pneumoconiosis, the detection of pneumoconiosis after the cessation of coal dust exposure, and the effect of non-pulmonary or non-respiratory conditions on the element of total disability due to pneumoconiosis could affect the outcome of this case and that, therefore, the case should be stayed. These issues were not reached, however, by the administrative law judge in his Decision and Order.

Claimant's sole, specific contention on appeal is that the administrative law judge improperly discounted Dr. Sundaram's opinion that he is totally disabled due, in part, to pneumoconiosis.[7] Director's Exhibit 138. In finding that employer established rebuttal of the interim presumption under Section 727.203(b)(3), the administrative law judge discounted Dr. Sundaram's opinion in favor of the opinions of Drs. Dahhan, Iosif, Fino, Jarboe and Branscomb, which indicate that claimant does not have a totally disabling pulmonary or respiratory impairment, but rather has a disabling coronary artery disease unattributable to pneumoconiosis. Decision and Order at 9; Employer's Exhibits 1, 34, 7, 8-10. Claimant suggests that the administrative law judge was required to give Dr. Sundaram's opinion determinative weight because Dr. Sundaram was his treating physician. This contention lacks merit. First, while the record indicates that Dr. Sundaram examined claimant on March 11, 1997, Director's Exhibits 121, 138, there is no indication in the record that Dr. Sundaram saw or treated claimant on any other occasion.[8] Furthermore, even if the record contained substantial evidence establishing that Dr. Sundaram was claimant's treating physician, the administrative law judge would not be *required* to credit Dr. Sundaram's opinion on that basis.[9] The administrative law judge properly discounted Dr. Sundaram's opinion in favor of the opinions submitted by Drs. Dahhan, Iosif, Fino, Jarboe and Branscomb since Drs. Dahhan, Iosif, Fino, Jarboe and Branscomb possess superior qualifications to Dr. Sundaram's for rendering an opinion on claimant's pulmonary condition. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 9. While the

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[7]Inasmuch as the instant claim was filed prior to March 31, 1980, the administrative law judge properly considered whether entitlement was established pursuant to the interim regulations at 20 C.F.R. Part 727. *See* 20 C.F.R. §718.2. We note that claimant has failed to challenge the administrative law judge's weighing of the evidence pursuant to Part 727. Rather, claimant contends that he has established entitlement to benefits under 20 C.F.R. Part 718.

[8]The record contains only one examination report from Dr. Sundaram, the report of the March 11, 1997 examination. Director's Exhibit 121. In addition, at his deposition, Dr. Sundaram stated that he saw claimant on March 11, 1997, but did not indicate that he examined claimant again or provided claimant with follow-up care. Director's Exhibit 138 at 5 *et seq.*

[9]While the United States Court of Appeals for the Sixth Circuit has held in *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 24 (6th Cir. 1993), that the opinions of treating physicians are entitled to greater weight than opinions of non-treating physicians, the court subsequently held that its opinion in *Tussey* does not require an administrative law judge to credit the opinion of a physician that is flawed. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

record establishes that Dr. Sundaram is Board-certified in internal medicine, Director's Exhibit 138, it further establishes that Drs. Dahhan, Iosif, Fino, Jarboe and Branscomb are Board-certified in pulmonary medicine as well as internal medicine. Director's Exhibits 119, 123; Employer's Exhibit 5. In addition, the administrative law judge properly credited Dr. Dahhan's opinion, finding it to be well-reasoned and documented, and properly credited the opinions of Drs. Iosif, Fino, Jarboe and Branscomb, together with Dr. Dahhan's opinion, on the basis that they were better supported by the objective evidence of record than was Dr. Sundaram's opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 9; Director's Exhibits118, 123, 124; Employer's Exhibits 1, 9. Accordingly, we affirm the administrative law judge's finding that the evidence was sufficient to establish rebuttal of the interim presumption under Section 727.203(b)(3), based on his weighing of the relevant medical opinions of record.

The instant claim, which was filed before, but adjudicated after, March 31, 1980, is also subject to review under the regulations at 20 C.F.R. Part 718. *See Caprini v. Director, OWCP*, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987). Although the administrative law judge did not specifically address the Part 718 regulations, his analysis of the medical opinion evidence under Section 727.203(b)(3) is relevant to the issue of whether claimant has established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). As discussed *supra*, contrary to claimant's contention, the administrative law judge properly discounted Dr. Sundaram's opinion that claimant is totally disabled due, in part, to pneumoconiosis, and properly credited the contrary opinions of Drs. Dahhan, Iosif and Fino, indicating that claimant does not have a totally disabling respiratory or pulmonary impairment attributable, even in part, to pneumoconiosis. The administrative law judge thus, in effect, properly found that claimant failed to establish total disability due to pneumoconiosis under Section 718.204(c), a requisite element of entitlement under Part 718. Claimant is therefore precluded from establishing entitlement to benefits pursuant to Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Additionally, inasmuch as claimant does not otherwise challenge the administrative law judge's finding that there was no mistake in a determination of fact in Judge Mosser's previous Decision and Order, and that the evidence in support of modification was insufficient to establish a change in conditions under Section 725.310 (2000), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); Decision and Order at 5-6, 9. We affirm, therefore, the administrative law judge's denial of benefits.

In light of the foregoing, we need not address employer's contentions on cross-appeal with regard to the administrative law judge's finding at Section 727.203(a)(1).

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge