

BRB No. 97-0720 BLA

LESLIE WHITMAN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PEABODY COAL COMPANY)	DATE ISSUED:
)	
and)	
)	
OLD REPUBLIC INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits Upon Remand from the Benefits Review Board of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Joseph H. Kelley (Monhollon & Kelley, P.S.C.), Greenville, Kentucky, for claimant.

John D. Maddox (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits Upon Remand from the Benefits Review Board (84-BLA-9098) of Administrative Law Judge Paul H. Teitler 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 is the third time that this case has come before the Board. Claimant filed an application for benefits on April 27, 1978. Director's Exhibit 1. In the initial Decision and Order - Award of Benefits issued on

August 21, 1987, the administrative law judge accepted a stipulation that claimant established twenty-eight years of coal mine employment. Further, the administrative law judge found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), (a)(2), and (a)(4). The administrative law judge also found that the evidence was insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(1)-(4), and found that claimant was entitled to benefits commencing as of April 1, 1978. Employer appealed, and the Board affirmed the administrative law judge's finding at Section 727.203(b)(1) as unchallenged on appeal. Further, the Board affirmed the administrative law judge's finding that rebuttal was not established pursuant to Section 727.203(b)(2) on the basis that the evidence of record was insufficient to establish Section 727.203(b)(2) rebuttal as a matter of law. The Board vacated the administrative law judge's findings that invocation of the interim presumption was established under Section 727.203(a)(1), (a)(2) and (a)(4) and that rebuttal was not established at Section 727.203(b)(3) and (b)(4) and remanded the case to the administrative law judge for reconsideration of the relevant evidence. The Board also modified the date that claimant would be entitled to benefits, if awarded, to February, 1981. Finally, the Board instructed the administrative law judge if, on remand, he found entitlement not established pursuant to 20 C.F.R. Part 727, to consider entitlement under 20 C.F.R. Part 718 pursuant to *Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989).¹ *Whitman v. Peabody Coal Co.*, BRB No. 87-2473 BLA (June 30, 1989)(unpub.).

On remand, the administrative law judge, in a Decision and Order issued on December 12, 1989, found the evidence sufficient to establish invocation pursuant to Section 727.203(a)(1) and (a)(2) and found that the evidence was insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(1)-(4). Accordingly, benefits were awarded. Employer appealed, and the Board affirmed the administrative law judge's findings of invocation at Section 727.203(a)(1), (a)(2), and no rebuttal at Section 727.203(b)(1) and (b)(4) as unchallenged on appeal. The Board also affirmed the administrative law judge's finding that the evidence was insufficient to establish rebuttal pursuant to Section 727.203(b)(3), holding that the administrative law judge permissibly concluded that the weight of the evidence of record failed to establish that the miner's pneumoconiosis did not contribute to his total disability and affirmed the award of benefits. *Whitman v. Peabody Coal Co.*, BRB No. 90-0217 BLA (Mar. 30, 1993)(unpub.). The Board subsequently granted employer's motion for reconsideration and vacated the administrative law judge's findings at Section 727.203(a)(1), (b)(3) and (b)(4). Accordingly, the case was remanded to the administrative law judge for further consideration. *Whitman v. Peabody Coal Co.*, BRB No. 90-0217 BLA (Aug. 11, 1995)(unpub. Order on

¹ The instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 2, 4.

Reconsideration).

On remand, in a Decision and Order issued January 28, 1997, the administrative law judge found that although the evidence was insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(4), the evidence was sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3). Accordingly, benefits were denied. In the present appeal, claimant argues that the Board erred in granting employer's request for reconsideration in the prior appeal. Claimant also argues that the administrative law judge erred in finding rebuttal established under Section 727.203(b)(3), and in not considering entitlement pursuant to Part 718. Employer, in response, argues that the administrative law judge properly found rebuttal established pursuant to Section 727.203(b)(3), and that any error by the administrative law judge in not making findings under Part 718 was harmless. Employer further argues that the administrative law judge erred in finding rebuttal not established pursuant to Section 727.203(b)(4). The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not respond to the current appeal.

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 the 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, claimant argues that the Board, in its 1995 Order on Motion for Reconsideration, did not have the "authority" to grant reconsideration of the previous Section 727.203(b)(3) finding and that the Board erred as a matter of law and effectively denied claimant due process. Claimant's Brief at 6-8. Specifically, claimant avers that the Board erred in vacating the administrative law judge's finding at Section 727.203(b)(3) in response to employer's argument that the administrative law judge erroneously relied on the opinions of physicians who had less expertise than the contrary opinions of doctors with superior expertise. Claimant's Brief at 7-8. Claimant's argument is without merit. The Board, on reconsideration, instructed the administrative law judge to consider the qualifications of the physicians as a factor in assigning the relative weight to the medical opinions at Section 727.203(b)(3) since he relied upon the qualifications of the physicians at Section 727.203(a)(4). *Whitman*, BRB No. 90-0217 BLA, slip op. at 3 (Aug. 11, 1995)(unpub. Order on Reconsideration). This holding by the Board is the law of the case, and we decline to disturb it as it is not clearly erroneous or contrary to a subsequent decision by a controlling authority. See *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting). Moreover, in granting employer's motion for reconsideration, the Board did not abuse its authority to reconsider its prior decision or deprive claimant of due process, as suggested by claimant. See 20 C.F.R. §§802.301(a), 802.407(a), 802.409.

Claimant further suggests that the Board acted inconsistently in not instructing the administrative law judge to consider the recency of the pulmonary function study evidence

of record, as well as the numerical superiority of the pulmonary evaluations, when it instructed the administrative law judge to revisit the physicians' qualifications. Claimant's Brief at 8. Claimant adds that the most recent pulmonary function study of record produced qualifying values. *Id.* at 10. However, the Board did not err in this regard inasmuch as pulmonary function studies are not diagnostic of the etiology of a respiratory impairment. See *Tucker v. Director, OWCP*, 10 BLR 1-35, 1-41 (1987). Moreover, the administrative law judge is not required to rely on the numerical superiority of pulmonary evaluations when weighing the medical opinions. See generally *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993).

Claimant also argues that the administrative law judge erred in crediting the opinions of Drs. Anderson and Gallo, which predate the 1986 pulmonary testing which the administrative law judge found sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(2). Claimant's Brief at 11. This argument has merit in light of the decision of the United States Court of Appeals for the Sixth Circuit in *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). In *Cooley*, the court stated that the interim presumption would be of little value if it can be rebutted by medical opinions derived from examinations conducted at a time before claimant established the conditions required to invoke the presumption. *Id.* In finding invocation established pursuant to Section 727.203(a)(2), the administrative law judge credited a pulmonary function study dated September 9, 1986, while the examinations conducted by Drs. Anderson and Gallo occurred in 1981. Claimant's Exhibit 5; Director's Exhibit 24. Thus, we vacate the administrative law judge's finding of rebuttal at Section 727.203(b)(3) and instruct the administrative law judge to consider on remand the probative value of the opinions of Drs. Anderson and Gallo in light of *Cooley*.²

² We reject claimant's contention that the fact that Drs. Anderson and Gallo did not diagnose pneumoconiosis renders their opinions unreliable under Section 727.203(b)(3). In *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), the United States Court of Appeals for the Sixth Circuit indicated that when an administrative law judge

finds the evidence sufficient to establish the existence of pneumoconiosis, the administrative law judge should treat, as lacking probative weight, a physician's opinion whose main point is that the miner does not have pneumoconiosis when considering the issue of whether a claimant suffers from a totally disabling respiratory impairment. In the instant case, the administrative law judge's finding that claimant established the existence of pneumoconiosis by establishing invocation of the interim presumption pursuant to Section 727.203(a)(1) was vacated by the Board inasmuch as the administrative law judge's finding was based upon the true doubt rule, which was held invalid by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). *Whitman v. Peabody Coal Co.*, BRB No. 97-0127 BLA (Aug. 11, 1995)(unpub. Order on Reconsideration). Thus, *Tussey* is inapplicable in the instant case.

Claimant argues that the administrative law judge considered the opinion of Dr. Getty even though the Board had previously ruled it was insufficient to rebut the presumption. Claimant's Brief at 6; 1997 Decision and Order at 3; *Whitman*, BRB No. 90-0217 BLA, slip op. at 3 n.3 (Mar. 30, 1993)(unpub.); *Whitman*, BRB No. 87-2473 BLA, slip op. at 4 n.7 (June 30, 1989)(unpub.). With respect to Dr. Getty's opinion, the administrative law judge, in his most recent Decision and Order, found Dr. Getty's opinion that claimant's inability to work was due to heart disease unreliable because he diagnosed claimant as suffering from pneumoconiosis. This finding constitutes error. See generally *Moseley v. Peabody Coal Co.*, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985). Moreover, the Board's earlier decision was in error when it held that Dr. Getty's opinion that claimant had no significant pulmonary impairment was insufficient as a matter of law to establish rebuttal at Section 727.203(b)(3). In addition to finding that claimant had no significant pulmonary dysfunction, Dr. Getty found that claimant's inability to work was due to his heart disease. Director's Exhibit 25. Thus Dr. Getty's opinion, if credited, is sufficient to establish rebuttal pursuant to Section 727.203(b)(3) under *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985).³ On remand, the administrative law judge must reconsider Dr. Getty's opinion at Section 727.203(b)(3). See *Gillen, supra*; *Williams, supra*.

Employer challenges the administrative law judge's finding that the evidence was insufficient to establish rebuttal at Section 727.203(b)(4).⁴ Contrary to employer's assertion, the administrative law judge permissibly credited the opinion of Dr. Getty, who found that claimant had chronic bronchitis that "could be most likely caused by coal dust inhalation," Director's Exhibit 25; see 20 C.F.R. §727.202, based on the fact that Dr. Getty was a pulmonary specialist who performed the most recent examination of claimant. See *Bowman v. Clinchfield Coal Co.*, 15 BLR 1-22 (1991); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); Director's Exhibit 25. However, we agree with employer's contention that the administrative law judge did not expressly weigh all of the relevant evidence and did not provide a sufficient explanation for his findings in simply stating that the x-ray evidence includes both positive and negative x-ray readings. Rather, the administrative law judge should have resolved the conflict in the x-ray evidence. See 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). We, therefore, vacate the administrative law judge's finding at Section

³ The United States Court of Appeals for the Sixth Circuit has held that in order to establish rebuttal pursuant to Section 727.203(b)(3), the party opposing entitlement must establish that pneumoconiosis played no part in causing the miner's disability. See *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985); see also *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 174, 12 BLR 2-121 (6th Cir. 1989).

⁴ Inasmuch as we vacate the administrative law judge's finding that rebuttal was established pursuant to Section 727.203(b)(3), we shall address the arguments submitted by employer in its response brief, which are in support of the denial below. *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983).

727.203(b)(4) and remand the case to the administrative law judge for reconsideration of the relevant evidence.

Finally, we remand the case to the administrative law judge for consideration of entitlement under Part 718 if the administrative law judge finds that entitlement is not established pursuant to Part 727. *Knuckles, supra*; see also *Consolidation Coal Co. v. McMahon*, 77 F.3d 898, 20 BLR 2-152 (6th Cir. 1996). We note that, on remand, the administrative law judge may reopen the record for the submission of additional evidence concerning claimant's current condition. See *McMahon, supra*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits Upon Remand from the Benefits Review Board is vacated and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge