

BRB No. 94-0880 BLA

FRANK McDOWELL)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
PEABODY COAL COMPANY)	
)	
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 on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Joseph H. Kelley, Madisonville, Kentucky, for claimant.

Janine F. Goodman (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (85-BLA-2051) of Administrative Law Judge Donald W. Mosser denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the third time. In *McDowell v. Peabody Coal Co.*, BRB No. 88-0953 BLA

¹ Claimant is Frank McDowell, the miner, who filed a claim for benefits on February 25, 1980. Director's Exhibit 1.

(May 25, 1990)(unpub.), the Board vacated the administrative law judge's finding that the interim presumption was rebutted pursuant to 20 C.F.R. §727.203(b)(3) and remanded the case for him to reweigh the relevant evidence.

On remand, the administrative law judge reweighed the evidence, found rebuttal not established at Section 727.203(b)(3), and awarded benefits. Employer appealed the award, and in *McDowell*

v. Peabody Coal Co., BRB No. 92-0680 BLA (May 26, 1993)(unpub.), the Board vacated the administrative law judge's finding pursuant to Section 727.203(b)(3) because he failed to provide a rationale for his weighing of the medical opinions. The Board noted that, while the administrative law judge listed several factors in each report which could have been used to provide a basis for crediting each opinion, he failed to indicate which of these factors, if any, he relied upon to credit the opinions of Drs. West, Getty, Calhoun, and O'Neill over the contrary opinion of Dr. Anderson to find that rebuttal was not established. [1993] *McDowell*, slip op. at 3.

In remanding the case, the Board stated that:

[S]ince under the Administrative Procedure Act (APA) the administrative law judge is bound to provide a rationale for crediting one opinion over another, we vacate the administrative law judge's determination and remand for further consideration under Section 727.203(b)(3) in accordance with the APA and the "played no part" standard articulated by the United States Court of Appeals for the Sixth Circuit in *Warman v. Pittsburg & Midway Coal Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988).

[1993] *McDowell*, slip op. at 3. The Board also instructed the administrative law judge to consider the claim under 20 C.F.R. Part 718 if entitlement was not established under Part 727. *Id.* at 4.

On remand, the administrative law judge² analyzed the medical opinions at Section 727.203(b)(3), concluding that "I cannot provide a rationale for crediting the opinions of Drs. West, Getty, Calhoun, and O'Neill over the opinion of Dr. Anderson." Decision and Order on Remand at 5. The administrative law judge accorded Dr. Anderson's opinion that claimant's disability was not due to pneumoconiosis but only to his heart disease the "most weight" because Dr. Anderson was more highly qualified, had reviewed most of the medical evidence of record, performed a "very thorough" physical examination, and relied on a more accurate smoking history in rendering his opinion. Decision and Order on Remand at 5-6. Thus, the

² Administrative Law Judge John Allan Gray issued the first two decisions. Because Judge Gray is no longer with the Office of Administrative Law Judges, the case was assigned on remand, without objection, to Judge Mosser.

administrative law judge found rebuttal established pursuant to Section 727.203(b)(3) and, accordingly, found entitlement not established under Part 727. The administrative law judge also considered and denied the claim under Part 718.

On appeal, claimant contends that the administrative law judge exceeded the scope of the Board's remand order by engaging in a *de novo* review of the evidence at Section 727.203(b)(3) because the case was remanded only for the administrative law judge to provide a rationale for crediting the opinions of Drs. West, Getty, Calhoun, and O'Neill over that of Dr. Anderson. Claimant's Brief at 4-9. Specifically, claimant asserts that Judge Mosser was bound by the "credibility determinations" made by Judge Gray because the Board did not hold that Judge Gray's decision to credit the four opinions was error, but rather, remanded the case simply for him to "fill in more detail" and "flesh out his earlier decision." Claimant's Brief at 5, 6-7. Noting that Judge Gray conducted the hearing and twice reviewed the medical evidence in this fifteen- year-old claim, claimant contends that "there is a sense of basic unfairness" in Judge Mosser's denial of benefits, where Judge Gray would have awarded benefits. Claimant's Brief at 6.

Employer responds, urging affirmance of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.³

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We disagree with claimant's contention that the administrative law judge on remand was not authorized to reweigh the evidence. Judge Mosser was not bound by Judge Gray's weighing of the evidence at Section 727.203(b)(3) because the Board vacated Judge Gray's credibility determinations for his failure to provide a rationale for his weighing of the evidence. See *Dale v. Wilder Coal Co.*, 8 BLR 1-119 (1985). The Board remanded the case for reconsideration at Section 727.203(b)(3) under the applicable rebuttal standard and the administrative law judge on remand complied. Nothing in the Board's remand language specifically limited him to crediting the same reports that Judge Gray had credited.

³ We affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §718. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board is not empowered to reweigh the evidence, see *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), and the administrative law judge on remand provided a valid rationale for crediting Dr. Anderson's opinion,⁴ see *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), which is sufficient to support a finding of rebuttal. See *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985); *Warman, supra*; *Wright v. Island Creek Coal Co.*, 824 F.2d 505, 10 BLR 2-185 (6th Cir. 1987). Therefore, we reject claimant's contention and affirm the administrative law judge's rebuttal finding pursuant to Section 727.203(b)(3).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

_____ JAMES F.
BROWN
Administrative Appeals Judge

_____ REGINA C.
McGRANERY
Administrative Appeals Judge

⁴ Dr. Anderson opined that claimant's disability was not due to his pulmonary condition but only to his heart disease, which was not related or due to his coal mine employment. Employer's Exhibit 5 at 29-32.