BRB Nos. 98-1300 BLA,
90-2304 BLA, 90-2304 BLA-A,
95-1135 BLA, and 96-0718 BLA

MARTIN L. STANLEY[1] (Executor of the Estate of JOHN ARTHUR STANLEY)	)	
Claimant-Respondent	)	
v.	)	
WESTMORELAND 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 Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Vernon M. Williams (Wolfe & Farmer), Norton, Virginia, for claimant.

Natalie D. Brown (Jackson & Kelly), Lexington, Kentucky, for employer.

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

PER CURIAM:

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[1]Claimant is Martin L. Stanley, Executor of the Estate of John Arthur Stanley, the miner, who filed two claims for benefits. The miner's first claim, filed with the Social Security Administration (SSA) on September 19, 1970, was denied by the SSA on November 5, 1973. Director's Exhibit 49. The miner's second claim was filed on July 31, 1979. Director's Exhibit 1.

Employer appeals the Decision and Order (84-BLA-7553) of Administrative Law Judge Clement J. Kichuk 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). This case is before the Board for the fifth time. Initially, Administrative Law Judge John Allan Gray, applying the regulations at 20 C.F.R. Part 727, credited the miner with forty-four years and two months of coal mine employment, and found the evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), (a)(2) in conformity with *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424, 8 BLR 2-109 (4th Cir. 1986), *rev'd sub. nom. Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135 (l987), and rebuttal established pursuant to 20 C.F.R. §727.203(b)(3). [1987] Decision and Order at 3-6. The administrative law judge also found that entitlement was precluded under 20 C.F.R. Part 410, Subpart D. [1987] Decision and Order at 6. Accordingly, benefits were denied.

On appeal, the Board vacated Judge Gray's findings of invocation pursuant to Section 727.203(a)(1) and (a)(2) in light of *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). *See Stanley v. Westmoreland Coal Co.*, BRB No. 87-3832 BLA, *slip op.* at 2 (June 30, 1989)(unpub.). The Board affirmed Judge Gray's finding that rebuttal was not established pursuant to Section 727.203(b)(1), but vacated his findings pursuant to Section 727.203(b)(3), and instructed him on remand, if necessary, to render findings pursuant to Section 727.203(b)(2) and (b)(4). *See Stanley, slip op.* at 2-3. The Board instructed Judge Gray that, if on remand he found entitlement not established pursuant to 20 C.F.R. Part 727, he must then determine whether entitlement had been established pursuant to 20 C.F.R. §410.490, as was then required by *Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988). *See Stanley, slip op.* at 3.

On remand, Judge Gray found that invocation was established pursuant to Section 727.203(a)(1), (a)(2), (a)(4) and that rebuttal was not established pursuant to Section 727.203(b). [1990] Decision and Order on Remand at 4-5, 9-11. Accordingly, benefits were awarded, commencing July 1, 1979. [1990] Decision and Order on Remand at 11. Judge Gray denied employer's subsequent motion for reconsideration.

On second appeal, the Board affirmed Judge Gray's denial of employer's motion to reopen the record. *See Stanley v. Westmoreland Coal Co.*, BRB Nos. 90-2304 BLA & 90-2304 BLA-A, *slip op.* at 3-4 (Jan. 27, 1994)(unpub.)(hereinafter *Stanley II*). The Board affirmed Judge Gray's findings pursuant to Section 727.203(a)(2), (a)(4) and Section 727.203(b)(2) as unchallenged on appeal. *See Stanley II, slip op.* at 3 n.2. The Board vacated Judge Gray's findings pursuant to Section 727.203(a)(1), and instructed him on remand to render Section 727.203(b)(4) findings, if he did not find subsection 727.203(a)(1) invocation established on remand. *See Stanley II, slip op.* at 4-5. The Board affirmed Judge

Gray's finding that the evidence was insufficient to establish Section 727.203(b)(3) rebuttal. *See Stanley II, slip op.* at 5-6. Finally, the Board vacated Judge Gray's finding regarding the date of entitlement, and instructed him to consider this claim under Section 410, Subpart D, if he finds entitlement not established pursuant to Part 727. *See Stanley II, slip op.* at 6.

On second remand, Judge Robert S. Amery[2] found that the miner failed to establish invocation pursuant to Section 727.203(a)(1), and that employer established rebuttal pursuant to Section 727.203(b)(4). [1995] Decision and Order on Remand at 2. The administrative law judge also found that the miner failed to establish entitlement under 20 C.F.R. Part 410, Subpart D. [1995] Decision and Order on Remand at 2-3. Accordingly, benefits were denied.

On third appeal, the Board affirmed Judge Amery's finding that the miner failed to establish invocation pursuant to Section 727.203(a)(1). *See Stanley v. Westmoreland Coal Co.*, BRB No. 95-1135 BLA, *slip op.* at 4 (Sept. 27, 1995)(unpub.)(hereinafter *Stanley III*). The Board also vacated Judge Amery's finding that rebuttal was established pursuant to Section 727.203(b)(4) and remanded the case for further consideration of the relevant evidence.[3] *See Stanley III , slip op.* at 5-7. Specifically, the Board held that the opinions of Drs. Zaldivar and Abernathy were insufficient, as a matter of law, to support employer's burden of establishing rebuttal pursuant to Section 727.203(b)(4). *See Stanley III, slip op.* at 5. The Board instructed Judge Amery to determine on remand whether the opinions of Drs. Garzon and Kress were sufficient to support employer's burden of establishing rebuttal pursuant to Section 727.203(b)(4) and to determine whether the qualifications of those physicians were superior to those of Drs. Paranthaman and Kanwal, who diagnosed

[2]This case was transferred to Judge Amery because Judge Gray retired from the Office of Administrative Law Judges. [1995] Decision and Order at 2. None of the parties objected to the transfer of this case. *Id.*

[3]The Board also affirmed, as unchallenged, Judge Amery's findings regarding length of coal mine employment, designation of responsible operator, and pursuant to 20 C.F.R. Part 410, Subpart D. *See Stanley v. Westmoreland Coal Co.*, BRB No. 95-1135 BLA, *slip op.* at 3 n.2 (Sept. 27, 1995)(unpub.).

pneumoconiosis. *See Stanley III, slip op.* at 5-6.

On third remand, Judge Amery again found that employer established rebuttal pursuant to Section 727.203(b)(4). [1996] Decision and Order on Remand at 2-3. Accordingly, benefits were denied.

On fourth appeal, the Board vacated Judge Amery's finding of Section 727.203(b)(4) rebuttal and remanded the case for him to reconsider the relevant evidence. *See Stanley v. Westmoreland Coal Co.,* BRB No. 96-0718 BLA, *slip op.* at 4-6 (Sept. 30, 1997)(unpub.)(hereinafter *Stanley IV*). The Board instructed Judge Amery on remand to consider whether Drs. Garzon and Kress definitively exclude coal mine employment as a causal factor in the miner's respiratory condition so as to meet employer's burden at Section 727.203(b)(4) and to consider whether the opinions of Drs. Abernathy and Zaldivar constitute probative evidence that the miner suffered from pneumoconiosis, as defined in 20 C.F.R. §727.202. *See Stanley IV, slip op.* at 6.

On fourth remand, the case was transferred to Administrative Law Judge Clement J. Kichuk [hereinafter the administrative law judge] who found that employer failed to establish rebuttal pursuant to Section 727.203(b)(4). [1998] Decision and Order on Remand at 3-8. Accordingly, benefits were awarded, commencing November 1, 1979. [1998] Decision and Order on Remand at 9.

In this appeal currently pending before the Board, employer asserts that the administrative law judge erred in not crediting the opinions of Drs. Garzon and Kress pursuant to Section 727.203(b)(4). Employer's Brief at 13-16. Employer also asserts that the administrative law judge erred in finding that the opinions of Drs. Abernathy and Zaldivar support a finding of pneumoconiosis. Employer's Brief at 17-18. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

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

[4]We affirm the administrative law judge's finding regarding the date of entitlement to benefits inasmuch as it is unchallenged on appeal. *See Coen v. Director, OWCP,* 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

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).

In considering the medical opinion evidence pursuant to Section 727.203(b)(4), the administrative law judge found the opinions of Drs. Garzon and Kress to be insufficient to establish rebuttal at this subsection. [1998] Decision and Order on Remand at 4-5. In doing so, the administrative law judge permissibly found that Dr. Garzon did not sufficiently explain his conclusory statement that according to the tests, he did not find any evidence of statutory pneumoconiosis. *Id; see Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *see also Crosson v. Director, OWCP*, 6 BLR 1-809 (1984)*; Duke v. Director, OWCP*, 6 BLR 1-673, 1-675 (1983). The administrative law judge also reasonably found that Dr. Garzon's statement that the "most likely" cause of the miner's pulmonary impairment was cigarette smoking still raises the question as to whether the miner's coal dust exposure may have significantly aggravated his condition, Director's Exhibit 22; Employer's Exhibit 2. [1998] Decision and Order on Remand at 4; *see Griffith v. Director, OWCP* [Myrtle], 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995)*; Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Moreover, the administrative law judge rationally, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), found Dr. Kress's opinion, that the miner does not have any pulmonary impairment, to be unreliable, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*)*; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), and unsupported by all the other evidence in the record, *see Oggero, supra; see also Crosson, supra; Duke, supra*, inasmuch as Drs. Kanwal, Garzon, and Abernathy all found the miner totally disabled due to a respiratory or pulmonary impairment. [1998] Decision and Order on Remand at 5.

An administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met its burden of proof, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Therefore, we reject employer's assertions, and affirm the administrative law judge's consideration of the opinions of Drs. Garzon and Kress.

With regard to the opinions of Drs. Abernathy and Zaldivar, employer asserts that the administrative law judge erred in finding that these opinions support a finding of pneumoconiosis. Employer's Brief at 17-18. The administrative law judge noted that the Board previously held that "as the opinions of Drs. Abernathy and Zaldivar are insufficient to establish the absence of statutory pneumoconiosis as defined in the Act and the regulations they cannot support a finding of rebuttal at Section 727.203(b)(4)," *see Stanley III, slip op.* at

5. [1998] Decision and Order on Remand at 6. The administrative law judge reviewed the findings of both these physicians and stated that neither is sufficient to support a finding of Section 727.203(b)(4) rebuttal. [1998] Decision and Order on Remand at 6-8.

To rebut the presumption pursuant to Section 727.203(b)(4), the evidence must establish both the absence of clinical pneumoconiosis and the absence of statutory pneumoconiosis as defined in the Act and the regulations, *i.e.*, the absence of any chronic respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§727.203(b)(4), 727.202; *see Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, (1995); *Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 BLR 2-95 (6th Cir. 1989); *Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985).

Dr. Abernathy stated that the miner probably sustains some small areas of emphysema due to coal dust exposure, Hearing Transcript at 30, and although Dr. Zaldivar stated that the miner's obstructive airways disease was unrelated to his coal mine work, his opinion does not rule out the possibility that the pulmonary disease was aggravated by dust exposure in the miner's coal mine employment, Employer's Exhibit 1. Therefore, these opinions are insufficient to establish the absence of statutory pneumoconiosis as defined in the Act and the regulations,[5] *see Goodloe, supra*, and we reject employer's assertions and reiterate our previous holding that neither opinion is sufficient to establish Section 727.203(b)(4) rebuttal. Accordingly, in light of the foregoing, we affirm the administrative law judge's finding that employer failed to establish Section 727.203(b)(4) rebuttal.

[5]"Section 727.202 defines pneumoconiosis as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment." *Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989)*; see* 20 C.F.R. §727.202.

Claimant's previous counsel, Carl W. Newman, has filed a complete, itemized statement requesting a fee for services performed on three prior Board appeals pursuant to 20 C.F.R. §802.203.[6] Mr. Newman requests a total fee of $5,606.25 for 74.75 hours at an hourly rate of $75.00. Employer objects to the award of attorney's fees on two grounds. First, employer states that Mr. Newman is not entitled to recover an attorney's fee because the award of benefits is not yet final. Employer's Letter at 1. Second, employer asserts that because Mr. Newman withdrew from this case before the claim was successful, he is not entitled to any fees under the Act. Employer's Letter at 1-2. Mr. Newman has responded to employer's objections.

Contrary to employer's first objection, an attorney's fee award may be approved pending a final award of benefits, but that fee award is neither enforceable nor payable until the award of benefits becomes final and that award reflects a successful prosecution of the claim. *See* 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT) (7th Cir. 1982); *Spinner v. Safeway Stores, Inc.*, 18 BRBS 155 (1986). Therefore, the Board may award attorney's fees, but this award cannot be enforced until there has been a successful prosecution of the claim. *See Wells, supra; Spinner, supra.*

Employer's second objection is also without merit. Although Mr. Newman withdrew from this case as of March 8, 1996, if claimant ultimately prevails on this claim, it will be due, in part, to his work on this claim prior to the instant appeal. In other words, if Mr. Newman had not keep this claim alive, through his work on successive appeals, then claimant would not have had a chance to succeed in this claim. Therefore, it reasonably follows that Mr. Newman is entitled to fees for work he performed on this case, as long as claimant is ultimately successful in prosecuting the claim. *See generally Davis v. U.S. Dept. of Labor*, 646 F.2d 609, 613 (D.C. Cir. 1980); *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 774 (5th Cir. 1981).

In calculating the number of hours for work performed during the period of August 30, 1990 through January 27, 1994, Mr. Newman determined that he had performed 47 hours of work. In reviewing those numbers, we find that Mr. Newman actually performed a total of 45.75 rather than the 47 hours he claimed. Thus, we disallow a total of 1.25 hours for counsel's miscalculation on the total number of hours for these entries.

Additionally, there are three entries for work performed during this same time period

[6]By order dated July 22, 1992, the Board approved an attorney's fee award of $2,137.50 for 28.50 hours of legal services at an hourly rate of $75.00 for work performed on the miner's first appeal to the Board.

which were not performed before the Board, but before the district director, and, therefore, may not be approved by the Board. 20 C.F.R. §725.366. These entries include: .25 hour for work performed on October 23, 1990, .25 hour for work performed on October 26, 1990, and .25 hour for work performed on July 25, 1992. Thus, we disallow a total of .75 hour for these entries.

Consequently, we hereby award a fee of $5,456.25 to Mr. Newman for 72.75 hours of legal services at an hourly rate of $75.00 to be paid directly to him by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203. Inasmuch as final decision in this case is still pending, this Order is neither enforceable nor payable until such time as an award of benefits to claimant becomes final and that award reflects a successful prosecution of the claim. *See Wells, supra; Spinner, supra.*

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed and an attorney's fee for work performed the Board is ordered.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge