BRB No. 99-0397 BLA

JACK L. CHUBB	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AMAX COAL COMPANY	)	
	)	
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 on Remand – Awarding Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

Jennifer U. Toth (Henry L. Solano, 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, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (80-BLA-9803) of Administrative Law Judge Rudolf L. Jansen 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). The instant claim, which was filed on August 22, 1978, has previously been before the Board.[1] In its most recent Decision and Order, the Board

[1]The procedural history of this case is set forth in the Board's prior, 1992 Decision and Order. *See Chubb v. Amax Coal Co.*, BRB Nos. 85-1516 BLA, 85-1516 BLA/A, and 88-1499 BLA

vacated the administrative law judge's July 31, 1996 Decision and Order awarding benefits under 20 C.F.R. Part 727. *Chubb v. Amax Coal Co.*, BRB No. 96-1610 BLA (Sept. 30, 1997)(unpublished). The Board vacated the administrative law judge's finding that the x-ray evidence was sufficient to establish invocation of the interim presumption under 20 C.F.R. §727.203(a)(1) because the administrative law judge improperly discredited the four negative readings of an x-ray taken on November 24, 1995 simply on the basis that the x-ray was taken on a portable x-ray machine, and its film quality was not listed as optimal. *Id*. In addition, the Board vacated the administrative law judge's finding that the medical opinion evidence was sufficient to establish invocation of the interim presumption under 20 C.F.R. §727.203(a)(4) because the administrative law judge improperly credited the opinions of Drs. Rader, Combs and Lenyo over employer's experts simply on the basis of the doctors' status as claimant's treating physicians, without making a finding that the record establishes a basis for holding that the treating physicians were in a better position to evaluate the miner.[2] *Id*., *citing Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992) and *Peabody Coal Co. v. Helms*, 901 F.2d 571, 3 BLR 2-449 (7th Cir. 1990). Consequently, the Board also vacated the administrative law judge's finding that the evidence was insufficient to establish rebuttal of the interim presumption under 20 C.F.R. §727.203(b)(3), and remanded the case for reconsideration on that issue.[3] *Id*. The Board instructed the administrative law judge to consider rebuttal under §727.203(b)(4) as well, in the event that he were to find on remand that invocation of the presumption was not established at Section 727.203(a)(1). *Id*. The Board further vacated the administrative law judge's determination as to the date of onset of claimant's total disability due to pneumoconiosis, and instructed the administrative law judge to reconsider this issue, if reached. *Id*. Finally, the Board rejected employer's contention, and affirmed, as the law of the case, its prior holding that this case is subject to the Part 727 regulations. *Id*.

(Aug. 28, 1992)(unpublished).

[2]The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that invocation of the interim presumption was not established under 20 C.F.R. §7272.203(a)(2) or (a)(3). *Chubb v. Amax Coal Co.*, BRB No. 96-1610 BLA (Sept. 30, 1997)(unpublished).

[3]The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that rebuttal of the interim presumption was not established under 20 C.F.R. §727.203(b)(1) or (b)(2). *Chubb v. Amax Coal Co.*, BRB No. 96-1610 BLA (Sept. 30, 1997)(unpublished).

In his Decision and Order on Remand, the administrative law judge found the evidence sufficient to establish invocation of the interim presumption at Section 727.203(a)(1) and (a)(4). The administrative law judge further found the evidence insufficient to establish rebuttal of the presumption at Section 727.203(b)(3), and that employer was precluded from establishing rebuttal under Section 727.203(b)(4) in light of the finding of invocation at Section 727.203(a)(1). Consequently, the administrative law judge awarded benefits. The administrative law judge found that he could not determine the date on which claimant became totally disabled due to pneumoconiosis. Noting that claimant worked for a period as a coal miner subsequent to filing his claim, and finding that the evidence was insufficient to establish that claimant was not totally disabled due to pneumoconiosis after his retirement in September 1982, the administrative law judge awarded benefits commencing on September 1, 1982. On appeal, employer challenges the administrative law judge's findings under Sections 727.203(a)(1) and (a)(4), and 727.203(b)(3). Employer further challenges the administrative law judge's finding with the regard to the commencement date of claimant's benefits, and argues that intervening case law since the Board's previous Decision and Order requires the Board to revisit its holding that the instant case is subject to the regulations at Part 727. Employer also contends that, given the protracted procedural history of this case, it has been denied due process. Claimant responds in support of the decision awarding benefits. The Director, Office of Workers' Compensation Programs (the Director), responds in opposition to employer's argument regarding the applicability of the Part 727 regulations to this claim and its due process argument. Employer has filed a reply brief, reiterating several of its contentions in its Petition for Review and brief.

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).

In challenging the administrative law judge's weighing of the x-ray evidence under Section 727.203(a)(1), employer advances three arguments. Employer argues that the administrative law judge erred in failing to consider the opinions of Drs. Tuteur and Meyers with regard to why the positive x-ray readings of record were insufficient to demonstrate the existence of pneumoconiosis. Second, employer contends, without reference to specific evidence, that the administrative law judge erred in failing to credit reports of x-rays of claimant's chest that were taken during treatment and/or hospitalization for heart-related problems. Employer argues that those x-ray reports indicating that claimant has a clear chest should have been credited over the positive readings of record as evidence establishing that claimant does not have pneumoconiosis. Third, employer contends that the administrative law judge impermissibly engaged in a mere head counting analysis, in contravention of the well-settled principle that such analysis is erroneous.

Employer's contentions lack merit. Contrary to employer's contention, the

administrative law judge specifically considered the fact that Dr. Tuteur viewed the x-ray evidence as negative for pneumoconiosis, a conclusion Dr. Tuteur reached based not upon any viewing of the actual x-ray films himself, but upon a review of the x-ray reports submitted by the various physicians in this case. Decision and Order at 2; Employer's Exhibits 53, 56. As discussed *infra*, the administrative law judge properly accorded determinative weight to the positive interpretations of claimant's films taken since 1982, which were submitted by radiologists possessing special radiological qualifications as B reader/Board-certified radiologists. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 n.5 (1985); Decision and Order at 3. Furthermore, contrary to employer's suggestion, the administrative law judge did not err in his consideration of Dr. Myers's conclusions with respect to the x-rays evidence of record. Dr. Myers based his conclusion that the radiological evidence is insufficient to establish that claimant has pneumoconiosis upon, for the most part, a mere review of the x-ray interpretations rendered by the other physicians in this case. Employer's Exhibits 24, 53, 56. While Dr. Meyers read one x-ray film himself as negative for pneumoconiosis, namely, the June 5, 1995 film, the administrative law judge considered Dr. Myers's reading and properly discounted it because the record does not reflect that Dr. Meyers possesses superior radiological qualifications. *See Roberts, supra*; Decision and Order at 3; Employer's Exhibit 24. Consequently, as was the case in employer's previous appeal, employer's arguments challenging the administrative law judge's consideration of the opinions of Drs. Tuteur and Myers with regard to the x-ray evidence amount to a request to reweigh the evidence, a task the Board cannot perform. *Chubb v. Amax Coal Co.*, BRB No. 96-1610 BLA (Sept. 30, 1997)(unpublished), slip op. at 3, n.3; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Furthermore, the administrative law judge did not err in failing to credit, over the positive readings of record, the portable chest x-ray readings which were taken while claimant was hospitalized and being treated for heart-related problems, x-rays which were silent as to whether claimant had pneumoconiosis, but indicated that claimant had a clear chest. While employer does not refer to any specific x-rays, the record reflects that portable chest x-rays were taken while claimant was hospitalized in 1982 and in 1993. *See* Claimant's Exhibit 18; Employer's Exhibits 18, 37, 42. The record does not reflect, however, that the physicians who ordered these films and interpreted them were dually-qualified B reader/Board-certified radiologists. Because the administrative law judge properly credited the positive readings of the films taken since 1982 based upon the superior qualifications of the radiologists submitting those interpretations, as discussed *infra*, any error the administrative law judge may have made in not specifically discussing the portable chest x-rays to which employer generally refers is harmless. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Nor did the administrative law judge mechanically credit the positive x-ray interpretations over the negative readings, as employer contends. Employer is correct in stating that the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has been critical of a head-counting approach, and has held

that an administrative law judge must attempt to weigh x-ray readings "by considering the age of the readings, the qualifications of the experts, the persuasiveness of their reports and any other relevant evidence." *Old Ben Coal Co. v. Battram,* 7 F.3d 1273, 18 BLR 2-42 (7th Cir 1993); *see also Zeigler Coal Co. v. Lemon*, 23 F.2d 1275, 18 BLR 2-279 (7th Cir. 1994). Contrary to employer's contention, however, the administrative law judge's analysis of the x-ray evidence comports with these requirements. The administrative law judge was instructed to reconsider on remand the negative readings of the November 24, 1995 film without discounting them simply on the basis that the x-ray was taken on a portable x-ray machine, and its film quality was not listed as optimal. *See Chubb v. Amax Coal Co.*, BRB No. 96-1610 BLA, slip op. at 2-3 (Sept. 30, 1997)(unpublished). The administrative law judge did so, and found that "since the 1982 film was taken, the positive readings among dually-qualified physicians constitute a sizeable majority of the readings by physicians possessing the most impressive credentials." Decision and Order at 3. The record contains five positive readings by dually-qualified B reader/ Board-certified radiologists of films taken after 1982, and two negative readings by equally-qualified radiologists of films taken after 1982.[4] Claimant's Exhibits 6, 12, 19, 21, 24; Employer's Exhibits 40, 54. Inasmuch as the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis is supported by substantial evidence and in accordance with law, we affirm the administrative law judge's finding that invocation was established under Section 727.203(a)(1). *See Battram, supra; Zeigler, supra; Roberts, supra.*

[4]Dr. Marshall read the film taken on April 23, 1984 as positive for pneumoconiosis. Claimant's Exhibit 6. Dr. Brandon read the film taken on May 19, 1987 as positive. Claimant's Exhibit 12. Drs. Cappiello and Bassali read the June 5, 1995 film as positive. Claimant's Exhibits 19, 21. Dr. Pathak read the film taken on November 8, 1995 as positive. Claimant's Exhibit 24. Dr. McGraw read the films dated June 5, 1995 and November 24, 1995 as negative for pneumoconiosis. Employer's Exhibits 40, 54.

Employer further contends that the administrative law judge erred in crediting the opinions of Drs. Combs, Rader and Lenyo as sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(4). Employer's arguments in support of its contention amount essentially to a request to reweigh the evidence. *See Anderson, supra*. The administrative law judge was instructed to reconsider on remand the opinions of Drs. Combs, Rader and Lenyo without crediting them simply because Drs. Combs and Rader were clamant's treating physicians and because Dr. Lenyo examined claimant on several occasions. *See Chubb v. Amax Coal Co.*, BRB No. 96-1610 BLA, slip op. at 3 (Sept. 30, 1997)(unpublished). On remand, the administrative law judge stated that he no longer gave greatest weight to the opinions of Drs. Combs, Rader and Lenyo on the basis of their status as treating physicians because the record did not support a finding that these physicians were in a better position to evaluate the miner on that basis alone. Decision and Order at 4. The administrative law judge properly exercised his discretion in crediting the doctors' opinions as well reasoned and documented, however, noting that the doctors based their opinions that claimant has a totally disabling respiratory impairment on their examinations of claimant.[5] *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 4; Claimant's Exhibits 2, 7, 11, 13, 15, 16, 18, 22, 23. The administrative law judge also properly found that the opinions of Drs. Deppe and Jacobsen support invocation at Section 718.203(a)(4) as well.[6] Decision and Order at 4; Director's Exhibits 9, 10, 17. The administrative law judge further credited Dr. Lenyo's report on the basis that Dr. Lenyo is Board-certified in internal medicine. *See Roberts, supra*; Decision and Order at 4; Claimant's Exhibit 2. With regard to Dr. Tuteur's opinion, which indicated that claimant does not have a totally disabling respiratory disease attributable to pneumoconiosis, the administrative law judge properly found that, while Dr. Tuteur is Board-certified in internal medicine, his opinion was entitled to less weight because he opined that claimant does not

[5]The administrative law judge also credited the opinions of Drs. Combs, Rader and Lenyo on the basis that the findings of the doctors are supported by the results of the pulmonary function studies of record. Decision and Order at 4. While the administrative law judge did not specifically consider the fact that several of the pulmonary function studies were considered invalid by employer's expert, Dr. Renn, any error the administrative law judge may have made in this regard is harmless in view of the administrative law judge's proper alternative reasons for crediting the opinions of Drs. Combs, Rader and Lenyo, and for discounting the opinions of Drs. Tuteur and Myers. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[6]Dr. Deppe stated in his report dated February 2, 1979, that claimant has a "fairly significant respiratory impairment," and indicated that while claimant was totally disabled by a head injury at that time, his respiratory disease was "certainly significant." Director's Exhibits 9, 10. Dr. Jacobsen, who saw claimant in the hospital in January 1993, indicated in his January 14, 1993 report that claimant had chronic respiratory disease and "may have significant silicosis." Employer's Exhibit 37.

have pneumoconiosis.[7] *See Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990); Decision and Order at 4; Employer's Exhibits 53, 56. The administrative law judge also properly discounted Dr. Myers's opinion as equivocal, noting that Dr. Myers stated that it was "possible" that coal dust "could" exacerbate bronchitis and that the contribution could not be quantified. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 4; Employer's Exhibit 24. We, therefore, affirm the administrative law judge's finding that invocation was established under Section 727.203(a)(4).

Employer next contends that the administrative law judge erred in determining that employer failed to establish rebuttal of the interim presumption under Section 727.203(b)(3). We disagree. As the Board held in its prior, 1997 Decision and Order, the administrative law judge applied the correct standard for subsection (b)(3) rebuttal in his 1996 Decision and Order, namely, the "contributing cause" standard enunciated by the Seventh Circuit in *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997). *See Chubb v. Amax Coal Co.*, BRB No. 96-1610 BLA, slip op. at 3-4 (Sept. 30, 1997)(unpublished); 1996 Decision and Order at 12. The administrative law judge properly applied the contributing cause standard once more on remand. The Board rejected employer's prior argument that claimant is totally disabled by heart disease, which precludes an award of benefits in light of the Seventh Circuit's decision in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994). Employer renews this argument, but we reject it as the Board's prior holding on the issue is the law of the case. *See Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). The administrative law judge's prior 1996 finding that rebuttal was not established under subsection (b)(3) was vacated for the same reason the administrative law judge's finding at Section 7272.203(a)(4) was vacated; *i.e.*, because the administrative law judge accorded greatest weight to the opinions of Drs. Combs, Rader and Lenyo merely on the basis of the physicians' treating physician status. On remand, the administrative law judge stated that he did not accord determinative weight to Drs. Combs, Rader and Lenyo on that same basis, but that rather he gave these opinions greatest weight for the reasons he provided under Section 727.203(a)(4), reasons which we have affirmed herein, as discussed *supra*. Decision and Order at 5. Accordingly, we affirm the administrative law judge's finding that the evidence of record was insufficient to establish rebuttal pursuant to Section 727.203(b)(3). In addition, inasmuch as we have affirmed the administrative law judge's finding that the x-ray evidence was sufficient to

[7] In *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990), the Seventh Circuit held that an administrative law judge's distrust of the employers' physicians' opinions as to whether the miner's lungs were impaired by any pulmonary or respiratory disease was not irrational where employers' physicians rejected the possibility that Mr. Shonk had anthracosis at all.

establish invocation of the interim presumption under Section 727.203(a)(1), as discussed *supra*, we affirm the administrative law judge's finding that employer is precluded from establishing rebuttal under Section 727.203(b)(4). *See Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); Decision and Order at 5.

Employer further contends that the administrative law judge erred in awarding benefits commencing on September 1, 1982. Employer argues that the administrative law judge failed to adequately weigh the evidence on this issue in violation of the Administrative Procedure Act. *See* 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). Employer's contention lacks merit. The Board instructed the administrative law judge to reconsider on remand whether the evidence of record establishes a date on which claimant became totally disabled due to pneumoconiosis. *See Chubb v. Amax Coal Co.*, BRB No. 96-1610 BLA, slip op. at 4 (Sept. 30, 1997)(unpublished). The Board noted that since claimant worked in coal mine employment for a period after he filed his claim in 1978, the administrative law judge must find that claimant's last date of coal mine employment is the date for the commencement of benefits unless the evidence establishes that claimant was not totally disabled at some point post-retirement. *Id*. The administrative law judge stated that he considered all of the evidence, but could not find any evidence which he could credit that establishes the specific date of onset of claimant's total disability. Decision and Order at 6. The administrative law judge further found that there was no credible evidence which establishes that claimant was not totally disabled at some point after he retired. *Id*. Employer argues that the administrative law judge made the wrong inquiry here because he failed to consider when claimant became totally disabled *due to pneumoconiosis*. Contrary to employer's contention, however, it is evident that the administrative law judge was considering the question of when claimant became totally disabled due to pneumoconiosis, even though the administrative law judge did not refer expressly to total disability due to pneumoconiosis, because the administrative law judge referred to evidence that claimant is totally disabled due to pneumoconiosis – namely, the reports of Drs. Combs, Rader and Lenyo. *Id*. Because the administrative law judge properly found that the medical evidence did not clearly establish the date on which claimant became totally disabled due to pneumoconiosis, or a date on which claimant was not totally disabled due to pneumoconiosis after retiring in September 1982, we affirm the administrative law judge's determination that claimant's benefits must commence as of September 1, 1982, the first day of the month in which claimant retired. See 20 C.F.R. §725.503(b); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *Donadi v. Director, OWCP*, 12 BLR 1-166 (1989), *aff'd on recon.*, 13 BLR 1-24 (1989).

Employer also argues that the recent decision of the United States Court of Appeals for the Seventh Circuit in *Midland Coal Co. v. Director, OWCP [Luman]*, 149 F.3d 558 (7th Cir. 1998), requires that the Board revisit its previous holdings in this case that claimant's claim is subject to the Part 727 regulations. Employer's contention is rejected. In *Luman*,

the court held that Section 10(c) of the APA, 5 U.S.C. §704, which provides for the finality of administrative orders, applies in black lung claims.[8] *Lumen* does not provide any support, however, for employer's contention that Administrative Law Judge Arthur White's 1982 Order permitting claimant to withdraw his 1978 claim, as discussed in the Board's 1992 Decision and Order, constituted a final Order such that this case would be subject to the regulations at Part 718, rather than the Part 727 regulations. *Luman* does not address the procedural requirements for withdrawal of a claim pursuant to 20 C.F.R. §725.306, requirements which the Board held were not met when Judge White permitted claimant's 1978 claim to be withdrawn. *See Chubb v. Amax Coal Co.*, BRB Nos. 85-1516 BLA, 85-1516 BLA/A, and 88-1499 BLA (Aug. 28, 1992)(unpublished). We affirm the Board's previous holdings that there was never a final order withdrawing claimant's 1978 claim, and that the instant claim is subject to the Part 727 regulations. These holdings are the law of the case. *See Bridges, supra*.

Finally, relying upon *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), employer contends that it was denied a fair opportunity to defend itself in light of the protracted procedural history of this case. Employer's contention lacks merit. The court in *Lockhart* held that a district director's inexcusable delay of seventeen years in providing notice of a claim to the employer did not afford the employer a reasonable time for it to appear and interpose a meaningful defense, and therefore, employer's right to due process was violated. *See Lockhart, supra.* In the instant case, employer received timely notice of claimant's claim, Director's Exhibit 16, attended the hearings in this case held in 1981, 1984, and 1996, and participated in all proceedings during the course of litigation. Furthermore, the administrative law judge on remand allowed employer to submit deposition testimony from Dr. Tuteur, testimony which the Board held in its 1997 Decision and Order was unfairly disallowed by the administrative

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[8]Section 10(c), 5 U.S.C. §704, provides, in pertinent part:

> Except as otherwise expressly required by statute, agency action otherwise final is final for purposes of this section whether or not there has been presented or determined an application...for any form of reconsideration....

5 U.S.C. §704.

law judge in 1996, in violation of employer's right to due process. We thus hold that, contrary to employer's contention, it was afforded a meaningful opportunity to interpose a defense in this case.

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge