BRB No. 99-1244 BLA

HAZEL EGGERS (Widow of JAMES W. EGGERS)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
CLINCHFIELD COAL COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Third Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, III (Vinyard & Moise), Abingdon, Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

HALL, Chief Administrative Appeals Judge:

Claimant appeals the Third Decision and Order on Remand (89-BLA-1338) of Administrative Law Judge Clement J. Kichuk denying benefits on claims filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act

[1]Claimant is the surviving spouse of the deceased miner who died on September 14, 1988. Director's Exhibit 84.

of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The instant case involving a miner's claim and a survivor's claim is before the Board for the fourth time. In a Decision and Order dated June 4, 1990, Administrative Law Judge John H. Bedford noted that the miner initially filed a Part B claim with the Social Security Administration (SSA). Judge Bedford further noted that the miner, after his claim was denied by the SSA, did not take any action to have the claim reviewed by the Department of Labor under the 1977 Amendments to the Act. Judge Bedford, however, determined that the miner filed a second claim on February 28, 1983. In his consideration of the miner's 1983 claim, Judge Bedford found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(c). Judge Bedford, however, found that the evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Judge Bedford, therefore, denied benefits in the miner's claim. Judge Bedford further found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Judge Bedford, therefore, also denied benefits in the survivor's claim.

By Decision and Order dated March 22, 1993, the Board rejected claimant's contention that the miner filed a claim in 1979. *Eggers v. Clinchfield Coal Co.*, BRB No. 90-1740 BLA (Mar. 22, 1993)(unpublished). The Board held that the since the miner's second claim was not filed until February 28, 1983, Judge Bedford properly applied the permanent criteria at 20 C.F.R. Part 718 to the miner's claim. *Id.* The Board, however, vacated Judge Bedford's finding that the evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and remanded the case for further consideration. *Id.*

Claimant subsequently filed an appeal with the United States Court of Appeals for the Fourth Circuit. By Decision and Order dated December 8, 1993, the Fourth Circuit dismissed claimant's appeal as "not ripe for review." *Eggers v. Clinchfield Coal Co.*, 11 F.3d 35, 18 BLR 2-67 (4th Cir. 1993).

Due to Judge Bedford's unavailability, Administrative Law Judge Charles P. Rippey reconsidered the claim on remand. Judge Rippey found that the evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, Judge Rippey denied benefits in the miner's claim. By Decision and Order dated April 29, 1996,

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[2]The Board affirmed Administrative Law Judge John H. Bedford's finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Eggers v. Clinchfield Coal Co.*, BRB No. 90-1740 BLA (Mar. 22, 1993)(unpublished). The Board, therefore, affirmed Judge Bedford's denial of benefits in the survivor's claim. *Id.*

the Board, noting that its initial decision was clearly erroneous and that to let it stand would produce manifest injustice, acknowledged an exception to the law of the case doctrine and reversed its prior holding that the miner's second claim was filed on February 28, 1983. *Eggers v. Clinchfield Coal Co.*, BRB No. 95-0737 BLA (Apr. 29, 1996) (Dolder, J. dissenting) (unpublished). The Board held that the miner filed a claim on August 24, 1979. *Id.* The Board, therefore, remanded the case to the administrative law judge to adjudicate the miner's claim pursuant to 20 C.F.R. Part 727. *Id.*

On remand, Judge Rippey found that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Judge Rippey further found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b). Accordingly, Judge Rippey awarded benefits in the miner's claim. Judge Rippey also found that claimant was entitled to derivative survivor's benefits pursuant to 20 C.F.R. §725.212. By Decision and Order dated September 25, 1997, the Board declined to revisit its determination that the Part 727 regulations applied to the miner's claim. *Eggers v. Clinchfield Coal Co.*, BRB No. 96-1624 BLA (Sept. 25, 1997) (McGranery, J. dissenting) (unpublished). The Board also affirmed Judge Rippey's findings pursuant to 20 C.F.R. §727.203(a)(1), (b)(1), (b)(2) and (b)(4) as unchallenged on appeal. *Id.* The Board, however, agreed with employer that manifest injustice would result if employer was denied the opportunity to have the record reopened for further development of evidence relevant to Section 727.203(b)(3) rebuttal. *Id.* The Board, therefore, vacated Judge Rippey's award of benefits and directed Judge Rippey on remand to reopen the record, upon motion by employer, for further consideration of rebuttal pursuant to 20 C.F.R. §727.203(b)(3). *Id.* The Board also vacated Judge Rippey's determination regarding the onset date

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[3]Because the miner filed his claim for benefits before January 1, 1982, the Board noted that claimant would be entitled to derivative survivor's benefits if benefits were ultimately awarded in the miner's claim. *Eggers v. Clinchfield Coal Co.*, BRB No. 95-0737 BLA (Apr. 29, 1996) (Dolder, J. dissenting) (unpublished).

[4]Insofar as the subsection (b)(3) rebuttal standard adopted by the United States Court of Appeals for the Fourth Circuit had been applicable since 1984, *see Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), the Board acknowledged that there had not been an actual change in the law. *Eggers v. Clinchfield Coal Co.*, BRB No. 96-1624 BLA (Sept. 25, 1997) (McGranery, J. dissenting) (unpublished). The Board, however, noted that cases issued subsequent to *Massey* clarified the legal standard for establishing subsection (b)(3) rebuttal and were not available to employer during the initial evidentiary development of the case. *Id.*; *see Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993).

of the miner's benefits. *Id.* The Board subsequently denied motions for reconsideration filed by both claimant and the Director, Office of Workers' Compensation Programs (the Director). *Eggers v. Clinchfield Coal Co.*, BRB No. 96-1624 BLA (Mar. 12, 1998) (Order) (unpublished).

Due to Judge Rippey's unavailability, Administrative Law Judge Clement J. Kichuk (the administrative law judge) reconsidered the claim on remand. By Order dated January 22, 1999, the administrative law judge provided the parties with time in which to submit additional evidence relevant to subsection (b)(3) rebuttal. After the parties submitted additional evidence, the administrative law judge found that the evidence of record was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erred in reopening the record on remand. Claimant also contends that the administrative law judge erred in finding the evidence sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Employer responds in support of the administrative law judge's denial of benefits. The Director has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant initially contends that the administrative law judge's reopening of the record pursuant to the Board's instructions was improper. Claimant notes that she is aware of the Board's prior ruling on this issue and merely wishes to preserve this issue for appeal. Claimant notes that she continues to rely on the arguments that she previously made in her motion for reconsideration filed with the Board in BRB No. 96-1624 BLA on or about October 24, 1997. The Board summarily rejected claimant's motion for reconsideration. *Eggers v. Clinchfield Coal Co.*, BRB No. 96-1624 BLA (Mar. 12, 1998) (Order) (unpublished). We decline to revisit our decision to allow employer an opportunity to reopen the record for further consideration of rebuttal pursuant to 20 C.F.R. §727.203(b)(3).

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[5]Employer submitted a transcript of Dr. Sargent's January 19, 1999 deposition testimony and a March 22, 1999 supplemental report prepared by Dr. Fino. Claimant submitted an April 21, 1999 supplemental report prepared by Dr. Robinette. The administrative law judge admitted this evidence into the record. Third Decision and Order on Remand at 6.

[6]The facts of the instant case are distinguishable from those in *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999), relied upon by our dissenting colleague. In *Stanley*, the United States Court of Appeals for

Claimant next argues that the administrative law judge committed numerous errors in finding the evidence sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). In finding the evidence sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3), the administrative law judge credited the opinions of Drs. Sargent and Naeye over that of Dr. Robinette. Third Decision and Order on Remand at 14-16.

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the Fourth Circuit recently held that an employer's petition to reopen the record was properly denied where the employer should have anticipated from the beginning the possible application of the Part 727 regulations and where the employer asked for the first time that the record be reopened when the case was on appeal after having already been remanded.

We note that the employer in *Stanley* did not argue that due process necessitated a remand for the development of new evidence under the interim standards until "nearly seven years after the [Board] ruled that the interim regulations applied." *Stanley*, 194 F.3d at 503, 22 BLR at 2-21. We have no such delay in the instant case. The Board, by Decision and Order dated April 29, 1996, ruled for the first time that the Part 727 regulations applied and remanded the case to Judge Rippey for his adjudication of the miner's claim pursuant to 20 C.F.R. Part 727. *Eggers v. Clinchfield Coal Co.*, BRB No. 95-0737 BLA (Apr. 29, 1996) (Dolder, J. dissenting) (unpublished). As we previously noted, the official record of the case was sent by the Board to the Office of Administrative Law Judges on July 26, 1996. *Eggers v. Clinchfield Coal Co.*, BRB No. 96-1624 BLA (Sept. 25, 1997) (McGranery, J. dissenting) (unpublished). Judge Rippey issued his Decision and Order on Remand on August 8, 1996. *Id.* Because the parties were unaware as to when the official record was received by Judge Rippey, and because Judge Rippey did not advise the parties that the case was ripe for consideration on remand, the Board held that employer did not have an adequate opportunity to request that the record be reopened. *Id.*

[7]The United States Court of Appeals for the Fourth Circuit has held that in order to establish rebuttal pursuant to subsection (b)(3), the party opposing entitlement must rule out any causal connection between a miner's disability and his coal mine employment. *See Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). A causal connection can be "ruled out" if positive evidence demonstrates that the miner suffers from no respiratory or pulmonary impairment of any kind or if such evidence explains all of any impairment present and attributes it solely to sources other than coal mine employment. *Lane Hollow Coal Co. v. Director, OWCP [Lockhart],* 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

Claimant initially argues that the "original opinions" of Drs. Sargent, Naeye, Caffrey and Fino are legally flawed. The administrative law judge, in finding the evidence sufficient to establish subsection (b)(3) rebuttal, relied upon the most recent opinions submitted by Drs. Sargent and Fino. Consequently, whether the "original opinions" of Drs. Sargent and Fino are legally sufficient to establish subsection (b)(3) rebuttal is irrelevant.

Claimant contends that the administrative law judge erred in relying upon Dr. Sargent's 1999 deposition testimony because it contradicted a statement in his earlier 1986 report. Claimant notes that Dr. Sargent, in his 1986 report, stated that "anyone with asthma can have their disease exacerbated by exposure to coal dust." *See* Director's Exhibit 59. However, claimant notes that Dr. Sargent, during his 1999 deposition, stated that coal dust exposure would not cause a permanent aggravation of asthma. *See* Claimant's Exhibit 1.

During his deposition, Dr. Sargent was asked to explain his statement in his 1986 report that "anyone with asthma can have their disease exacerbated by exposure to coal dust." Dr. Sargent noted that coal dust, like dust from the road or gasoline fumes at a gas station, acts as a nonspecific environmental irritant and can precipitate an asthma attack. Claimant's Exhibit 1 at 14. Dr. Sargent further explained that this type of worsening of asthma is a transient phenomenon that, in general, reverses completely after the exposure is removed or after an individual takes appropriate medication to reverse the bronchospasm. *Id.* Dr. Sargent, therefore, opined that coal dust exposure would not cause a permanent aggravation of asthma. *Id.*

On cross examination, Dr. Sargent was asked why he had put the statement that "anyone with asthma can have their disease exacerbated by exposure to coal dust" in his 1986 report. Dr. Sargent responded:

> In general, not in this man because he had some other disabilities, but in general, one of the questions that's asked in black

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[8]In his 1986 report, Dr. Sargent opined that the miner's ventilatory defect was purely an obstructive defect which could be explained on the basis of asthma and obstructive lung disease due to smoking cigarettes, and not on the basis of exposure to coal dust. Director's Exhibit 59. Dr. Sargent added that "anyone with asthma can have their disease exacerbated by exposure to coal dust." *Id.* During his 1999 deposition, Dr. Sargent opined that neither the miner's pneumoconiosis nor his coal dust exposure was a contributing factor to his disability. Claimant's Exhibit 1 at 20-21. Dr. Sargent specifically indicated that he did not believe that the miner's coal dust exposure contributed in any way to his disability. *Id.* at 33.

> lung cases is: Does the individual have the respiratory capacity to do their previous job in the coal mine?
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> So I think to comment on that, if you take away this man's leg that was cut off or his bad heart, would his respiratory capacity allow him to still work in the mines? In this case, no. But in some cases where the impairment is mild, you still would have to be cautious about recommending an individual with asthma go back into the mines without some sort of monitoring.
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> In this case I would admit that that probably has very little bearing on this case, but in some cases it is an issue.

Claimant's Exhibit 1 at 28.

Contrary to claimant's contention, we hold that Dr. Sargent's opinion expressed during his 1999 deposition that the miner's disability was not due to his coal dust exposure does not contradict opinions expressed in his earlier 1986 report.

Claimant next contends that Dr. Sargent's initial deposition testimony was based on only part of the autopsy evidence. Although claimant acknowledges that Dr. Sargent was later given an opportunity to review the autopsy reports of Drs. Shah and Naeye, claimant contends that such a "piecemeal approach to reviewing evidence certainly undermines Dr. Sargent's testimony." Claimant's Brief at 7. We decline to address this contention inasmuch as claimant has not adequately explained how Dr. Sargent's deposition testimony was undermined by the fact that he did not initially review all of the autopsy evidence.

Claimant also argues that the administrative law judge should have discredited Dr. Sargent's opinion because Dr. Sargent could "not exclude that the 'ill-defined' density in the right upper lobe he identified on chest x-ray in 1986 was not a macronodule of coalworker's pneumoconiosis identified by the prosecting pathologist (Dr. Shah) on autopsy." Claimant's Brief at 7. Because Judge Bedford

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[9]Dr. Sargent interpreted claimant's July 21, 1986 x-ray as positive for pneumoconiosis. Director's Exhibit 59. Dr. Sargent also noted a "possible nodule [in the] right upper lobe...." *Id.*

During his deposition, Dr. Sargent was asked whether the abnormality that he saw on the 1986 x-ray could correlate with the finding made by the autopsy prosector of a macronodule of coal workers' pneumoconiosis. Claimant's Exhibit 1 at 24. Dr. Sargent noted that he could not exclude that possibility. *Id.* After

previously determined that the evidence was insufficient to establish the existence of complicated pneumoconiosis, *see* 1990 Decision and Order at 7, we reject claimant's contention that the administrative law judge should have discredited Dr. Sargent's opinion because he could not exclude the possibility that a density that he identified on a 1986 x-ray was a macronodule of coal workers' pneumoconiosis.

Claimant, citing *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), finally argues that Dr. Sargent erroneously assumed that coal dust exposure does not cause a purely obstructive impairment. In *Warth*, the United States Court of Appeals for the Fourth Circuit held that an administrative law judge should not rely on a physician's opinion that a miner does not suffer from pneumoconiosis when it is based on an assumption that obstructive disorders cannot be caused by coal mine employment. *Warth*, 60 F.3d at 174-175, 19 BLR at 2-268-269. However, the Fourth Circuit subsequently clarified its holding in *Warth* when it issued *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). In *Stiltner*, the Fourth Circuit noted that, unlike the medical opinions that it had examined in *Warth*, none of the challenged physicians in that case had assumed that coal mine employment could never cause chronic obstructive pulmonary disease. *Id.* The Fourth Circuit noted that the challenged physicians in *Stiltner* merely opined that the miner likely would have exhibited a restrictive impairment in addition to chronic obstructive pulmonary disease, if coal dust exposure were a factor. *Id.* The Fourth Circuit further noted that the physicians based their opinions not only on the absence of a restrictive impairment, but also upon their review of the miner's entire medical history, including his pulmonary function studies, blood gas tests and x-ray interpretations. *Id.* The Fourth Circuit, therefore, held that the administrative law judge could rely upon these opinions to support his finding of subsection (b)(3) rebuttal. *Id.*

Unlike the physicians in *Warth* and like the physicians in *Stiltner*, Dr. Sargent's opinion was not based upon an erroneous assumption that coal mine employment can never cause chronic obstructive pulmonary disease. *See Stiltner*,

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reviewing the autopsy reports of Drs. Caffrey, Naeye and Shah, Dr. Sargent opined that the three reports conclusively established the existence of simple pneumoconiosis. *Id.* at 30. Dr. Sargent, however, noted that there was disagreement as to whether complicated pneumoconiosis was present. *Id.* Dr. Sargent noted that while Dr. Shah diagnosed complicated pneumoconiosis, Drs. Naeye and Caffrey did not. *Id.* Dr. Sargent opined that his review of the autopsy evidence did not change his testimony in any way. *Id.* at 32-33.

[10]Dr. Sargent merely indicated that he did not believe that coal dust exposure would cause a purely obstructive defect. In the instant case, Dr. Sargent explained that there was no evidence consistent with an impairment due to pneumoconiosis.

supra; *Warth*, *supra*.

Turning to Dr. Fino's opinion, Claimant contends that Dr. Fino makes equivocal comments that undermine his opinion. Claimant, however, fails to identify any of the allegedly "equivocal" comments made by Dr. Fino. Claimant merely notes that they are "set forth in the emotion [sic] for reconsideration." Claimant's Brief at 7-8. The Board summarily rejected claimant's motion for reconsideration. *See Eggers v. Clinchfield Coal Co.*, BRB No. 96-1624 BLA (Mar. 12, 1998) (Order) (unpublished).

Claimant also notes that Dr. Fino concluded that the miner suffered from mild simple coal workers' pneumoconiosis, a finding that claimant contends does not square with the prosector's finding of "marked anthracosis consistent with complicated pneumoconiosis." Claimant's Brief at 8. However, as previously noted, Judge Bedford determined that the evidence was insufficient to establish the existence of complicated pneumoconiosis. *See* 1990 Decision and Order at 7. Therefore, claimant's contention has no merit.

Claimant also contends that the administrative law judge erred in discrediting Dr. Robinette's opinion. In his April 22, 1999 report, Dr. Robinette opined that:

> Obviously, [the miner] had significant hypoxemia occurring at least in part due to the ventilation profusion abnormalities related to his significant pulmonary disease and not related to his cardiac disease. There is marked destruction of the lung tissue occurring as a consequence of the coal dust deposition, fibrosis and emphysematous change.
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> Obviously, [the miner] suffered from simple coal workers' pneumoconiosis that was associated with an impairment of his diffusion capacity associated with hypoxemia and probably associated with some component of air flow obstruction.

Claimant's Exhibit 1.

Claimant's Exhibit 1 at 18. Dr. Sargent noted that when coal workers' pneumoconiosis causes an impairment, spirometry reveals an obstruction that does not reverse. *Id.* Dr. Sargent also noted that the miner's lung volume was 98 percent of predicted with a residual volume of 147 percent of predicted, findings that Dr. Sargent noted were not consistent with coal dust induced lung disease. *Id.*

Dr. Robinette concluded that the miner's coal workers' pneumoconiosis was a significant contributing factor to his pulmonary disability. Claimant's Exhibit 1.

The administrative law judge gave "no weight to the hypoxemia finding assessed by Dr. Robinette." Third Decision and Order at 15. The administrative law judge noted that Dr. Sargent, who examined the miner and reviewed the medical evidence, gave "no such significance to hypoxemia, which he found to be mild upon examination." *Id.* The administrative law judge found that Dr. Robinette's opinion that the miner's hypoxemia was attributable to the miner's coal workers' pneumoconiosis was "not well reasoned and [was] openly ambiguous...." *Id.*

Claimant argues that the administrative law judge, in noting that the miner's PO2 improved from 57.9 to 115.0 on September 30, 1986, failed to address the fact that the latter arterial blood gas study was conducted while the miner was on oxygen. We agree. In his Discharge Summary dated October 18, 1986, Dr. Maine noted that while the miner's initial PO2 on room air was 57, it increased to 115 after the miner was placed on oxygen. *See* Claimant's Exhibits 10, 17.

The administrative law judge, however, discredited Dr. Robinette's opinion because he failed to comment upon the significance of the improvement in the miner's PO2 values from September 1986 to October 1987. Dr. Robinette did not

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[11]The administrative law judge noted that the miner's PO2 on admission to the hospital on September 30, 1986 was 57.9 at 6:00 a.m. and 115.0 at 11:37 a.m. Third Decision and Order on Remand at 15.

[12]In his April 16, 1989 report, Dr. Fino reviewed records relating to the miner's hospitalization from September 28, 1987 to October 6, 1987. Dr. Fino observed that the miner's PO2 on discharge had improved to 78. Dr. Fino explained that:

> This is very important. Please remember that in a recent letter from Dr. Maine he commented on a PO2 of 57. Now there is significant improvement with a PO2 of 78. Such improvement in a PO2 value means that there is some reversibility in this man's lung and heart disease as both lung and heart disease can cause low PO2's. However, if the low PO2 values were due to pulmonary fibrosis from simple coal workers' pneumoconiosis, then there would be no improvement.

Previous Employer's Exhibit 2.

The administrative law judge stated that:

explain how an improvement in the miner's PO2 values would affect his conclusion that the miner suffered from hypoxemia due to his lung disease. The administrative law judge also noted that neither Dr. Sargent nor Dr. Fino found that the miner suffered from hypoxemia due to his lung disease.

The administrative law judge also noted that Dr. Robinette concluded that the miner's disability was caused in part due to pneumoconiosis because the mere existence of coal workers' pneumoconiosis in the lung suffices to establish some "pathological effects." Third Decision and Order on Remand at 15; Claimant's Exhibit 1. The Board has recognized that the mere diagnosis of pneumoconiosis is insufficient to support a finding that the pneumoconiosis has caused any impairment. *See Dees v. Peabody Coal Co.*, 5 BLR 1-117 (1982). Under such circumstances, we hold that the administrative law judge acted within his discretion in finding that Dr. Robinette's opinion was not sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Claimant next contends that the administrative law judge erred in giving no weight to the opinions of Drs. Paranthaman and Maine. In his summary of the

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> I find this analysis by Dr. Fino is highly persuasive and diminishes the reliability of Dr. Robinette's assessment of the miner's hypoxemia. It appears Dr. Robinette was not alerted to the miner's periodic PO2 improvement to a normal level and, thus, leaves Dr. Fino's analysis uncontradicted. I find Dr. Robinette's opinion of disability and death due to coal workers' pneumoconiosis is not well reasoned, nor supported by the probative medical data and is legally flawed. I find the reports and opinions of Drs. Sargent and Fino, including Dr. Naeye's opinion, are sufficient to rebut invocation of the presumption pursuant to §727.203(b)(3).

Third Decision and Order on Remand at 16.

[13]Dr. Paranthaman examined the miner on December 12, 1983. In a report dated December 20, 1983, Dr. Paranthaman opined that the miner suffered from chronic bronchitis and emphysema. Director's Exhibit 14. Dr. Paranthaman opined that these conditions were "related to or aggrevated [sic] by [the miner's] coal dust exposure." *Id.* Dr. Paranthaman opined that the miner suffered from a moderately severe respiratory impairment related to his chronic bronchitis and emphysema. *Id.*

In his most recent letter dated May 10, 1989, Dr. Maine indicated that he

relevant evidence, the administrative law judge referenced the reports of Drs. Paranthaman and Maine. *See* Third Decision and Order on Remand at 6-7. We find the administrative law judge's error in not explicitly considering the opinions of Drs. Paranthaman and Maine pursuant to 20 C.F.R. §727.203(b)(3) is harmless inasmuch as the administrative law judge implicitly accorded greater weight to the most recent opinions of record since these physicians had the most complete picture of the miner's health. *See generally Sabett v. Director, OWCP*, 7 BLR 1-299 (1984).

We, therefore, affirm the administrative law judge's finding that the evidence is sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3).

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treated the miner for several years prior to his death. Claimant's Exhibit 18. Dr. Maine opined that the miner suffered from "significant disabling coal worker's pneumoconiosis and was disabled due to the same." *Id.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I would vacate the decision of Administrative Law Judge Kichuk, denying benefits, and reinstate the decision of Administrative Law Judge Rippey, awarding benefits in both the miner's claim and derivatively, in the survivor's claim. After the case had been remanded to Administrative Law Judge Rippey and he had awarded benefits, employer requested for the first time that the record be reopened to address the rebuttal standard at 20 C.F.R. §727.203(b)(3), when the case was on appeal to the Board. Over the objection of both claimant and the Director, the Board granted that request. *Eggers v. Clinchfield Coal Co.,* BRB No. 96-1624 BLA (Sept. 25, 1997)(McGranery, J., dissenting). The basis of employer's request was that the Board's prior remand order, directing the administrative law judge to apply the Part 727 regulations to the claim, constituted a change in law. Employer argued that it had developed its evidence by asking its experts to analyze the case in terms of the Part 718 regulations, although employer also argued that reports from two of its doctors could have established rebuttal under Part 727. Brief for Employer in BRB No. 96-1624 BLA at 8-9.

[14]Administrative Law Judge Rippey properly rejected the reports of Drs. Sargent and Fino as insufficient to establish rebuttal at Section 727.203(b)(3) because they found only that pneumoconiosis did not play a "significant role in the miner's respiratory disability." Second Supplemental Decision and Order on Remand at 2 (Aug. 8, 1996).

Both claimant and the Director petitioned the Board to reconsider its decision, to no avail. The Director argued that employer had been on notice from the Board's prior decision that the administrative law judge would apply the Part 727 regulations, yet employer never requested the administrative law judge to reopen the record, before or after his decision, hence, employer had waived its argument. The Director pointed out that the majority's decision in the instant case was inconsistent with another decision which the Board issued on the same day. The Director declared that in *Swarrow v. Labelle Processing Co.,* BRB No. 97-0103 BLA, slip op. at 4 (Sept. 25, 1997), the Board had upheld an administrative law judge's refusal to reopen the record: "because employer's request was deemed untimely (it came three days after the ALJ's decision, and thus, while the ALJ maintained jurisdiction over the case); here, the employer made no request whatsoever before the ALJ; yet that failure is entirely excused and employer's inaction is rewarded." (Letter from the Director in BRB No. 96-1624 BLA at 2 n.2 (Oct. 24, 1997)). Furthermore, the Director had previously pointed out that employer had been put on notice by the list of contested issues for the first hearing in the case, CM 1025, Director's Exhibit 154, that the law was unsettled and that the Part 727 regulations might apply. The Board majority held, however, that because the Fourth Circuit's Section 727.203(b)(3) rebuttal standard set forth in *Bethlehem Mines Corp., v. Massey,* 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), had been clarified in *Grigg v. Director, OWCP,* 28 F.3d 416, 18 BLR 2-229 (4th Cir. 1994) and *Thorn v. Itmann Coal Co.,* 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993), manifest injustice would result if employer were denied the opportunity to have the record reopened to develop new evidence applicable to Section 727.203(b)(3). *Eggers* at 4. The Director demonstrated in his Motion for Reconsideration the flaw in the majority's rationale: although *Grigg* and *Thorn* were issued subsequent to the record closure, these cases did not establish a new (b)(3) rebuttal standard because *Grigg* adopted the reasoning of the Board's decision in *Marcum v. Director, OWCP,* 11 BLR 1-23 (1987), holding that a finding of no pulmonary impairment may satisfy (b)(3) rebuttal and *Marcum* was issued a year *before* the record was closed in the case at bar. The Director's analysis reveals both that employer waived its right to have the record reopened, and that the basis of the alleged right, *i.e.* that the law had changed, was entirely specious.

Perhaps the most telling point is that the "clarified" standard set forth in *Grigg* and *Thorn* requires a physician to state unequivocally that the miner is not suffering from any respiratory or pulmonary impairment of any kind in order to support Section 727.203(b)(3) rebuttal and in the case at bar, the existence of claimant's respiratory impairment was never in dispute. On remand, employer presented new evidence addressing the *Massey* standard, that claimant's respiratory impairment was not caused by coal mine employment. Thus, employer has ultimately prevailed because the Board enabled it to present evidence on remand which it could have presented at the original hearing.

Since, as the majority acknowledges, the administrative law judge's decision finding rebuttal established at Section 727.203(b)(3) is supported exclusively by newly submitted evidence, the validity of the majority's order to reopen the record on remand is at the heart of claimant's appeal. That the Board's order to reopen the record rests on two basic legal errors is revealed when the facts of the instant case are considered in light of the Fourth Circuit's decision in *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999). In that decision, the Fourth Circuit made plain that employer's petition to reopen the record was properly denied where employer should have anticipated from the beginning the possible application of the Part 727 regulations and where employer asked for the first time that the record be reopened when the case was on appeal after having been remanded. The court stated: "By failing to ask the ALJ to reopen the evidentiary record, *Betty B* acquiesced in the resolution of the claim on the existing record." *Stanley*, 194 F.3d at 503, 22 BLR at 2-21. In addition to finding that employer had waived its argument, the court found baseless employer's contention that a court's subsequent construction of a regulation, to mean something different from what the party understood, is not a change in law: "When such open questions are answered, the law has been declared, not changed." *Stanley*, 194 F.3d at 501, 22 BLR at 2-18. In sum, because the evidence supporting rebuttal was admitted as a result of compounded errors in the Board's decision, first in failing to apply the doctrine of waiver, second by misapprehending the standard to warrant reopening of the record, Administrative Law Judge Kichuk's decision denying benefits should be vacated and Administrative Law Judge
Rippey's decision awarding benefits should be reinstated.

REGINA C. McGRANERY
Administrative Appeals Judge