

BRB No. 01-0563 BLA

TILDA COLE)	
(Widow of JOHN COLE))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED:
)	
EAST KENTUCKY COLLIERIES)	
)	
and)	
)	
OLD REPUBLIC INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Respondent)	

Appeal of the Third Decision and Order on Remand of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Third Decision and Order on Remand (93-BLA-0602) of Administrative Law Judge Paul A. Mapes 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).¹ This case is before the Board for the fourth time. The miner filed a living miner's claim in March 1980 and died in April 1983. The miner's widow, claimant herein, filed a claim for survivor's benefits in April 1983. In a Decision and Order issued in October 1993, Administrative Law Judge Robert S. Amery determined that employer was the properly designated responsible operator, credited the miner with at least eighteen years 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), (2). The administrative law judge further found that rebuttal of the interim presumption was not established

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). The regulations at 20 C.F.R. Part 727 were not amended, however, and the amendments to the regulations at 20 C.F.R. §§725.492 and 725.493 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of these regulations as published in the 2000 Code of Federal Regulations is applicable. See 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

pursuant to 20 C.F.R. §727.203(b) and, accordingly, awarded benefits on the miner's claim as of June 1979.²

Both employer and the Director, Office of Workers' Compensation Programs (the Director), appealed the award of benefits to the Board. In *Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996), the Board affirmed Judge Amery's findings regarding the identity of the responsible operator, length of coal mine employment and that invocation of the interim presumption was established pursuant to Section 727.203(a)(2). The Board also affirmed Judge Amery's findings that the evidence was insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(1)-(3). The Board, however, vacated Judge Amery's finding that invocation of the interim presumption was established pursuant to Section 727.203(a)(1) and that rebuttal was precluded pursuant to Section 727.203(b)(4), as well as his onset date determination. The Board remanded the case for further consideration of rebuttal pursuant to Section 727.203(b)(4) and, if necessary, reconsideration of the evidence relevant to determining the date of onset of total disability due to pneumoconiosis. In addition, the Board noted that invocation pursuant to Section 727.203(a)(1) need not be reconsidered on remand inasmuch as Judge Amery's invocation finding at Section 727.203(a)(2) had been affirmed.

On remand, the case was reassigned to Administrative Law Judge Mapes (the administrative law judge) who found that the evidence was sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(4) and further found that entitlement was precluded pursuant to 20 C.F.R. Part 718. Accordingly, benefits were denied.

Claimant appealed the denial of benefits to the Board and in *Cole v. East Kentucky Collieries*, BRB No. 97-1321 BLA (June 19, 1998)(unpub.), the Board vacated the administrative law judge's finding that the evidence was sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(4) and remanded the case to the administrative law judge for reconsideration of whether the evidence was sufficient to establish the absence of pneumoconiosis in accordance

² Based on the filing date of the miner's claim, the administrative law judge found claimant was derivatively entitled to an award of benefits and it, therefore, was unnecessary to adjudicate the survivor's claim under 20 C.F.R. Part 718. See 20 C.F.R. §725.212.

with the holding of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidation Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989).

On remand for the second time, the administrative law judge found that the x-ray interpretations, medical test results and physicians' opinions were insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(4). Accordingly, benefits were awarded commencing June 1979, the month in which the administrative law judge found that the miner became totally disabled due to pneumoconiosis.

Employer appealed the award of benefits to the Board and in *Cole v. East Kentucky Collieries*, BRB No. 99-0556 BLA (Sept. 29, 2000)(unpub.), the Board rejected employer's reiteration of its argument concerning the administrative law judge's finding that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(3). The Board also affirmed the administrative law judge's finding that the evidence was insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(4). In addition, the Board addressed employer's argument that it was denied due process by a delay in the designation of a responsible operator by the district director and, therefore, liability for the payment of benefits should transfer to the Black Lung Disability Trust Fund (Trust Fund). The Board declined to hold that employer previously waived its due process argument and remanded the case to the administrative law judge for a determination as to whether actions attributable to the district director resulted in substantial prejudice to employer and, therefore, a violation of due process, in light of the relevant case law, including the recent decision of the United States Court of Appeals for the Sixth Circuit in *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000).

On remand for the third time, the administrative law judge found that employer's due process rights were not violated, that liability for payment of benefits did not transfer to the Trust Fund and that employer was liable for the payment of benefits. On appeal herein, employer asserts that the administrative law judge erred in finding that its due process rights were not violated and that liability did not transfer to the Trust Fund. Claimant has not responded to this appeal. The Director has filed a response limited to opposing employer's argument that liability should transfer to the Trust Fund. Employer has also filed a reply brief wherein it reiterates the arguments set forth 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 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).

The miner filed his claim in March 1980 and on May 6, 1981, the district director named Ratliff Trucking Company (Ratliff Trucking) as the responsible operator because Ratliff Trucking was the employer with whom the miner had his most recent coal mine employment of not less than one year. See 20 C.F.R. §725.493; Director's Exhibits 4, 18. Jerry Ratliff, the owner of Ratliff Trucking, filed a controversion on May 21, 1981. Director's Exhibit 19. On January 13, 1983, the case was referred to the Office of Administrative Law Judges for a hearing. The miner died on April 3, 1983. Director's Exhibit 24. Administrative Law Judge James P. Abel granted a continuance of the scheduled hearing on August 28, 1985, to determine whether Ratliff Trucking met the requirements of 20 C.F.R. §725.492 regarding its ability to pay benefits. *Id.*

Subsequently, the district director issued an undated Amended Notice of Initial Finding naming East Kentucky Collieries (hereinafter employer) as the responsible operator. *Id.* In a separate letter dated May 9, 1986, the district director dismissed Ratliff Trucking as a party to the claim. *Id.* On June 5, 1986, employer filed its controversion and on June 13, 1986, employer filed a motion to dismiss, alleging that either Don Ratliff Trucking or Jerry Ratliff Trucking was the correct responsible operator. *Id.* On June 24, 1986, the district director issued a letter denying the motion because both trucking companies were not insured and were out of business. *Id.* On July 9, 1986, the district director issued an amended notice of initial determination affirming his initial finding of eligibility for benefits. *Id.* On July 15, 1986, employer requested a hearing and on August 22, 1986, the case was referred to the Office of Administrative Law Judges.

In an Order of Remand issued on August 8, 1988, Administrative Law Judge Rudolf L. Jansen determined that employer requested remand and was entitled to an explanation of why Ratliff Trucking could not pay benefits and why employer was designated the responsible operator. Director's Exhibit 25. In a letter to employer dated October 28, 1988, the district director set forth, in detail, the basis upon which Ratliff Trucking was dismissed as the responsible operator. The district director noted that: Ratliff Trucking was not insured for black lung benefits; the owner, Jerry Ratliff, was divested of all interest in the company in accordance with a divorce settlement in 1983; Judy Ratliff, his ex-wife, sold the company and all of its assets in 1984; and there were no assets available from the company. The district director again found that employer was the responsible operator and granted employer thirty days to submit rebuttal evidence. Director's Exhibit 26. No additional evidence was

obtained and subsequently, on June 20, 1989, the district director again referred the claim to the Office of Administrative Law Judges for a hearing. Director's Exhibit 28.

On June 29, 1990, Administrative Law Judge Daniel Stewart remanded the claim for further development of the responsible operator issue because the record was still incomplete. Decision and Order on Remand at 5; Director's Exhibit 29. On February 14, 1991, the district director renamed Ratliff Trucking as a potential responsible operator, but later dismissed Ratliff Trucking on the ground that the company was not financially capable of paying benefits. Decision and Order on Remand at 5. On January 12, 1993, the claim was referred to the Office of Administrative Law Judges for a hearing.

On June 25, 1993, Judge Amery held a hearing on the merits and on October 1, 1993, he issued his Decision and Order awarding benefits upon finding invocation of the interim presumption established at Section 727.203(a)(1), (2) and that rebuttal of the interim presumption was not established pursuant to Section 727.203(b). Judge Amery also found that employer was the proper responsible operator in light of evidence confirming that the miner's most recent employers, Ratliff Trucking and Don Ratliff Trucking, were not financially able to meet the criteria for a responsible operator as required by Sections 725.492 and 725.493. Judge Amery further found that East Kentucky Collieries, as the next most recent employer with whom the miner had a period of coal mine employment of not less than one year and capable of assuming liability, met the criteria of Sections 725.492 and 725.493 and was thus the properly designated responsible operator. Judge Mapes's findings on the issue of responsible operator are discussed *supra*.

Employer contends that the administrative law judge erred in finding that its due process rights were not violated by the Director's delay in notifying it of the miner's claim. In his Third Decision and Order on Remand, the administrative law judge discussed the circumstances in several cases decided by the United States Courts of Appeals for the Fourth and Sixth Circuits and concluded that on the basis of these decisions, liability for the payment of benefits can be transferred to the Trust Fund in cases in which a putative responsible operator successfully establishes that it has been denied a fair opportunity to defend itself against the claim and the denial was the result of the Director's failure to properly fulfill one of his assigned duties.³

³ The administrative law judge referred to the holdings *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999) and *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000). Third Decision and Order on Remand at 7-11.

Third Decision and Order on Remand at 11. The administrative law judge initially found that the Director acted properly in originally identifying Ratliff Trucking as the responsible operator. *Id.* The administrative law judge next found that while the Director's actions were "arguably dawdling and inefficient," there was no showing that these delays denied employer a "fair opportunity to defend itself" against the claim. Third Decision and Order on Remand at 12. The administrative law judge concluded that the Director had no duty to designate another responsible operator until after he received information in January 1986 which demonstrated that Ratliff Trucking was no longer in business and was not financially capable of paying benefits. Third Decision and Order on Remand at 11. The administrative law judge thus correctly found that transfer of liability was not warranted as 20 C.F.R. §725.412 (2000) imposes no time limits on the Director's identification and notification of the responsible operator, other than that such identification shall be made as soon after the filing of the claim as the evidence obtained permits. *Director, OWCP v. Oglebay Norton Co. [Goddard]*, 877 F.2d 1300, 12 BLR 2-357 (6th Cir. 1989).

While the Director has the burden of establishing an operator's financial ability to assume liability for the payment of benefits, see *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995), Section 725.492 provides that: "[i]n the absence of evidence to the contrary, a showing that a business or corporate entity exists shall be deemed sufficient evidence of an operator's capability of assuming liability...." 20 C.F.R. §725.492. In the instant case, Ratliff Trucking was in operation when it was originally identified as the responsible operator, and although it was not insured for benefits liability, there was no evidence that it was incapable of assuming liability at that time. After the submission of additional evidence in 1985, showing the demise of Ratliff Trucking's business and indicating that Ratliff Trucking was not capable of assuming liability, the Director identified employer as a potential operator.

Upon determining that Ratliff Trucking was definitely incapable of assuming liability, employer was named the putative responsible operator. The record reveals that after notice of its potential liability, employer had an opportunity to develop evidence and defend against claimant's application for benefits at each stage of adjudication and employer in fact developed an appreciable amount of evidence between 1986 and the hearing on the merits in 1993. Although employer was not identified as the responsible operator until after the miner's death, the administrative law judge reasonably determined that employer failed to show that it was denied an opportunity to mount a meaningful defense and thus, transfer of liability was not warranted as no violation of employer's right to due process had occurred. *Holdman, supra; Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th

Cir. 1999); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); Third Decision and Order on Remand at 11-12. Consequently, we affirm the administrative law judge's finding that employer, the properly designated responsible operator, and not the Trust Fund, is the party liable for the payment of any benefits awarded.

Nevertheless, employer correctly argues that it was not in accordance with law for Judge Amery to give an automatic preference to the examining physicians in his consideration of the medical opinion evidence at Section 727.203(b)(3). In considering whether the evidence was sufficient to establish rebuttal of the interim presumption pursuant to subsection (b)(3), Judge Amery stated:

Drs. Broudy, Fino and Tuteur state that they did not believe that the miner had any pulmonary impairment from his coal mine employment. However, none of these doctors examined the miner; they merely reviewed his medical records, and for this reason their opinions may be given less weight.

1993 Decision and Order at 11. In its published decision on appeal, the Board held that the administrative law judge acted within his discretion in according less weight to the opinions of the non-examining physicians as the administrative law judge did not completely reject them as unworthy of any weight. *Cole*, 20 BLR at 1-55.

Upon further review of Judge Amery's findings and our holding with respect thereto, we acquiesce in employer's request to reevaluate the propriety of our resolution of this issue. The question of whether a physician's opinion is sufficiently documented and reasoned is a credibility matter for the administrative law judge. 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); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). Circuit law indicates, however, that automatic preferences are disfavored. See *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2- (6th Cir. 2002); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Thus, the opinions of treating and examining physicians should not automatically be presumed to be correct, entitled to the greatest weight or considered to have the most probative value. The administrative law judge must examine the opinions of all of the physicians on their merits and make a reasoned judgment about their credibility, with proper deference given to the examining physicians' opinions, when warranted. *Clark, supra*; *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989). In the instant case, Judge Amery stated that the opinions of Drs. Broudy, Fino and Tuteur were accorded less weight because they merely reviewed the miner's medical records. This finding does not contain the requisite inquiry into the credibility and reasonableness of the opinions consistent with circuit law. Thus, in

light of the facts of this particular case, we vacate Judge Amery' s finding that the evidence was insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3) and remand the case to the administrative law judge for reconsideration of the relevant medical opinions. On remand, the administrative law judge must set forth his credibility determinations regarding the medical opinions of record in detail. To the extent that it is inconsistent with this opinion, the Board's 1996 decision in *Cole, supra*, is hereby overruled.

Accordingly, the Third Decision and Order on Remand of the administrative law judge awarding benefits is affirmed in part, vacated in part and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge