BRB No. 02-0465 BLA

RAY MAGGARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Modification of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Denying Modification (00-BLA-0513) of Administrative Law Judge Rudolf L. Jansen 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 has a long procedural history. Claimant filed a miner's claim for benefits on March 16, 1978. In a Decision and Order dated February 7, 1985, Administrative Law Judge Joan Huddy Rosenzweig credited claimant with eighteen years of coal mine employment, and considered the claim under the applicable regulations at 20 C.F.R. Part 727 (2000). Judge Rosenzweig found the evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and (a)(4) (2000), and insufficient to establish rebuttal of the interim presumption under 20 C.F.R. §727.203(b) (2000). Accordingly, Judge Rosenzweig found claimant entitled to benefits. Employer appealed, challenging Judge Rosenzweig's finding that invocation was established under Section 727.203(a)(1) and (a)(4) (2000), and contending that Judge Rosenzweig erred in failing to find rebuttal established under Section 727.203(b)(2) (2000). The Board affirmed Judge Rosenzweig's finding of invocation under Section 727.203(a)(1), and determined that, consequently, it did not need to address employer's arguments at Section 727.203(a)(4) (2000). *Maggard v. Peabody Coal Co.*, BRB No. 85-0625 BLA (Apr. 30, 1987)(unpublished). The Board vacated, however, Judge Rosenzweig's finding that rebuttal was not established at Section 727.203(b)(2) (2000), and remanded the case for reconsideration of all of the relevant evidence thereunder. *Id*.

In a Decision and Order on Remand dated February 19, 1988, Judge Rosenzweig found the evidence insufficient to establish rebuttal at Section 7272.203(b)(2) (2000) under *York v. Director, OWCP*, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987), inasmuch as none of the physicians of record stated that claimant was not totally disabled without regard to cause. Accordingly, benefits were awarded. Employer appealed. The Board affirmed Judge Rosenzweig's finding of no rebuttal at Section 727.203(b)(2) (2000), but remanded the case for consideration of rebuttal under Section 727.203(b)(3) (2000) since Judge Rosenzweig had not determined whether claimant did not suffer from a totally disabling respiratory or pulmonary impairment. *Maggard v. Peabody Coal Co.*, BRB No. 88-0944 BLA (Mar. 20, 1992)(unpublished).

[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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

In a Second Supplemental Decision and On Remand dated February 25, 1993, Judge Rosenzweig denied employer's request to reopen the record for submission of additional medical evidence, and found that employer failed to establish rebuttal under Section 727.203(b)(3) (2000). Accordingly, benefits were awarded. Employer appealed. The Board affirmed Judge Rosenzweig's decision awarding benefits. *Maggard v. Peabody Coal Co.*, BRB No. 93-1226 BLA (Jan. 9, 1995)(unpublished). Employer filed a Motion for Reconsideration with the Board, which the Board summarily denied in an Order dated December 17, 1996. *Maggard v. Peabody Coal Co.*, BRB No. 93-1226 BLA (Dec. 17, 1996)(unpublished Order). Employer filed a Motion for Reconsideration of the Board's December 17, 1996 Order.[2] The Board summarily denied this Motion for Reconsideration in an Order dated Sept. 30, 1997. *Maggard v. Peabody Coal Co.*, BRB No. 93-1226 BLA (Sept. 30, 1997)(unpublished Order). Subsequently, employer filed an appeal with the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises.[3] The court dismissed employer's appeal as untimely, granting a motion to dismiss from the Director, Office of Workers' Compensation Programs (the Director). *Peabody Coal Co v. Director, OWCP [Maggard]*, No. 97-4371 (6th Cir. June 22, 1998)(unpublished Order).

[2]As a basis for this Motion for Reconsideration, employer contended that the Board's Order denying employer's prior motion for reconsideration was contrary to a then recent decision rendered by the United States Court of Appeals for the Sixth Circuit in *Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997). Director's Exhibit 107.

[3]Because claimant's coal mine employment occurred in Kentucky, the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Employer filed a timely Petition for Modification with the district director on March 19, 1999. Director's Exhibit 119. In support of modification, employer submitted medical opinions from Drs. Dahhan, O'Neill, Renn and Tuteur. The case was subsequently referred to Administrative Law Judge Rudolf L. Jansen (the administrative law judge), who held a hearing on June 27, 2001. In a Decision and Order dated February 28, 2002, the administrative law judge credited claimant with eighteen years of coal mine employment, found that a change in conditions was not established under 20 C.F.R. §725.310 (2000), and stated that he would consider the entire record to determine whether a mistake in a determination fact was established thereunder pursuant to employer's modification request. The administrative law judge found the evidence of record insufficient to establish invocation of the interim presumption under Section 727.203(a)(1)-(3) (2000), but found the evidence of record sufficient to establish invocation under Section 7272.203(a)(4) (2000). The administrative law judge further found that the evidence of record was insufficient to support employer's burden of establishing rebuttal under Section 727.203(b)(1)-(4) (2000). The administrative law judge thus found that employer failed to establish a mistake in a determination of fact pursuant to Section 725.310 and, accordingly, awarded benefits. On appeal, employer contends that the administrative law judge erred in failing to find a mistake in a determination of fact under Section 725.310, challenging the administrative law judge's weighing of the evidence of record under Sections 727.203(a)(4) (2000) and 727.203(b)(3) and (b)(4) (2000). Claimant has filed a response brief in support of the administrative law judge's decision awarding benefits. The Director has filed a letter indicating he does not presently intend to participate in the proceedings on appeal.[4]

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 findings under Sections 727.203(a)(4) (2000) and 727.203(b)(3) and (b)(4) (2000), employer argues that the administrative law judge improperly credited the medical opinions of Drs. Calhoun, Norsworthy and West over the contrary opinions of Drs. Dahhan, O'Neill, Renn and Tuteur, which employer submitted in support of its modification petition, simply on the basis that Drs. Calhoun, Norsworthy and

[4]We affirm, as unchallenged on appeal, the administrative law judge's findings that invocation of the interim presumption was not established under 20 C.F.R. §727.203(a)(1)-(3) (2000), that rebuttal of the interim presumption was not established under 20 C.F.R. §727.203(b)(1) and (b)(2) (2000), and that a change in conditions was not established under 20 C.F.R. §725.310 (2000). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 8-11.

West examined claimant. Employer argues that, rather than evaluating the scope and reasoning of the conflicting medical opinions, and the relative qualifications of the physicians who submitted reports, the administrative law judge erred by resorting to an automatic preference for the opinions of the examining physicians. Employer's contention has merit.

Drs. Calhoun and West, who examined claimant on November 5, 1976 and March 16, 1978, respectively, concluded that claimant has pneumoconiosis and is totally disabled due to the disease. Director's Exhibits 12, 13. Dr. Norsworthy, who likewise opined that claimant is totally disabled due to pneumoconiosis, was claimant's treating physician over many years, treating claimant for numerous conditions.[5] Director's Exhibits 25, 129. Drs. Dahhan, O'Neill, Renn and Tuteur, who are Board-certified in internal medicine and pulmonary diseases, reviewed the medical evidence of record and opined that claimant does not have pneumoconiosis and is not totally disabled from a pulmonary or respiratory standpoint. Director's Exhibits 127, 129, 131; Employer's Exhibits 1, 2, 3, 5. These physicians indicated that claimant has mild, reversible chronic obstructive pulmonary disease related to a heavy cigarette smoking history of one-half to three-quarter packs per day for twenty years.

[5]The record includes Dr. Norsworthy's treatment notes for office visits dating back to 1970, with numerous office visits from 1995 through 1998, relating to treatment for a variety of conditions, including heart disease, peptic ulcer disease, chronic bronchitis and an orthopaedic condition. Director's Exhibit 129. The record reflects that claimant sustained a neck injury in a 1975 mine accident. *Id.*

In considering the evidence under Sections 727.203(a)(4), (b)(3) and (b)(4) (2000),[6] the administrative law judge found the opinions of Drs. Calhoun, Norsworthy and West to be well-reasoned and documented. Decision and Order at 10-12. The administrative law judge then found the conflicting opinions of Drs. Dahhan, O'Neill, Renn and Tuteur to be equally well-reasoned and documented, and noted that these physicians are well-qualified pulmonologists.[7] *Id*. The administrative law judge stated that he was according greatest weight to the opinions of Drs. Calhoun, Norsworthy and West, however, because these physicians had "a firsthand knowledge of Mr. Maggard's condition obtained through a physical examination." *Id*. While an administrative law judge may credit the opinion of an examining physician over that of a non-examining physician, whether or not a physician examines the miner is only one factor to be considered. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993)*; King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985); *Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). The United States Court of Appeals for the Sixth Circuit has held that the opinion of an examining or treating physician must be "properly credited and weighed." *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002). That is, the administrative law judge must critically analyze the documentation and reasoning of the opinion before according it enhanced weight. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 710, BLR (6th Cir. 2002).

In the instant case, the administrative law judge discounted the opinions of Drs. Dahhan, O'Neill, Renn and Tuteur solely because these physicians did not examine claimant. Decision and Order at 11-12. The administrative law judge did not explain why this factor alone detracted from the opinions, which were based upon the Board-certified pulmonary

[6]In order to establish rebuttal of the interim presumption under 20 C.F.R. §727.203(b)(3) (2000), employer must prove that pneumoconiosis played no part in causing claimant's disability. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).

[7]The record does not indicate that Drs. Calhoun, Norsworthy and West are Board-certified pulmonologists.

specialists' review of all of the medical evidence of record. *See Tussey, supra*; *King, supra; Worthington, supra*; *but see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); Decision and Order at 10-12; Director's Exhibits 127, 129, 131; Employer's Exhibits 1, 2, 3, 5. Also, the administrative law judge failed to adequately analyze the documentation and reasoning of the conflicting opinions. *See Groves, supra; Napier, supra.* When an administrative law judge does not make necessary findings, the proper course for the Board is to remand the case to the administrative law judge rather than attempting to fill in the gaps in the administrative law judge's opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Inasmuch as the administrative law judge has not articulated a sufficient rationale for crediting the opinions of Drs. Calhoun, Norsworthy and West over the contrary opinions of Drs. Dahhan, O'Neill, Renn and Tuteur under Sections 727.203(a)(4), (b)(3) and (b)(4) (2000), we vacate the administrative law judge's findings thereunder.

In light of the above-referenced errors, we vacate the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000) and remand the case for further consideration. On remand, should the administrative law judge find a mistake in a determination of fact, he must ultimately determine whether reopening the claim will render justice under the Act. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999).[8]

[8]In *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999), a case arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, the Board held that "while [an] administrative law judge has the authority to reopen a case based on any mistake in fact, [an] administrative law judge's exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." *Kinlaw*, 33 BRBS at 72 (citing *Washington Society for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991)). On remand, the administrative law judge should address whether employer should have anticipated the need to develop the medical evidence submitted in support of its modification petition at an earlier date.

Accordingly, the administrative law judge's Decision and Order – Denying Modification is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge