BRB No. 88-4143 BLA

RUBY JONES (Widow of RICHARD JONES) Claimant-Respondent v. OLD BEN COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Glenn Robert Lawrence, Administrative Law Judge, United States Department of Labor.

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

Edward Waldman (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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 Decision and Order (80-BLA-3078) of Administrative Law Judge Glenn Robert Lawrence 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] Claimant[2] filed a survivor's claim for benefits on August 27, 1976. In a Decision and Order dated February 12, 1981, the administrative law judge credited the miner with fifteen years of coal mine employment and considered the claim under the applicable regulations at 20 C.F.R. Part 727 (2000). The administrative law judge found the autopsy evidence in the record sufficient to establish that the miner suffered from pneumoconiosis and that, therefore, claimant established invocation of the interim presumption under 20 C.F.R. §727.203(a)(1) (2000). The administrative law judge further determined that employer failed to rebut the presumption under 20 C.F.R. §727.203(b) (2000). Accordingly, the administrative law judge found claimant entitled to benefits. Employer appealed, conceding that the presumption was invoked under Section 727.203(a)(1) (2000), but contending that the administrative law judge erred in not finding the presumption rebutted under Section 727.203(b)(3) (2000). Specifically, employer argued that the administrative law judge erred in crediting claimant's testimony over the medical evidence, which employer asserted showed that the miner's death and total disability did not arise, in whole or in part, out of his coal mine employment. The Board vacated the administrative law judge's finding that rebuttal of the presumption was not established, and remanded the case for a full explanation and weighing of all of the relevant evidence under Section 727.203(b)(3) (2000). *Jones v. Old Ben Coal Co.*, BRB No. 81-0466 BLA (Dec. 24, 1985)(unpublished).

In a Decision and Order on Remand dated March 31, 1986, the administrative law

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[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.

[2]Claimant is the surviving spouse of the deceased miner, who died on August 22, 1976. Director's Exhibit 10. The miner's death certificate indicates that the primary cause of the miner's death was an acute myocardial infarction, and does not list another cause for the miner's death. *Id.*

judge found the relevant evidence – namely, the opinions of Drs. Black, Cooper and Beck – insufficient to establish rebuttal of the interim presumption at Section 727.203(b)(3) (2000). Accordingly, the administrative law judge found claimant entitled to benefits. Subsequently, employer filed an appeal on December 9, 1988. The Board dismissed employer's appeal as untimely in an Order dated April 21, 1989. *Jones v. Old Ben Coal Co.*, BRB No. 88-4143 BLA (Apr. 21, 1989)(unpublished Order).

Employer appealed the Board's order dismissing its appeal to the United States Court of Appeals for the Seventh Circuit. In its decision issued on March 15, 1990, the Seventh Circuit court reversed the Board's determination that it did not have jurisdiction over employer's appeal, and remanded the case to the Board for consideration of the merits of employer's appeal. *Old Ben Coal Co. v. Director, OWCP [Jones]*, 897 F. 2d 900, 13 BLR 2-360 (7th Cir. 1990). On March 11, 1991, the Board issued an Order reinstating employer's appeal, and directing employer to file its Petition for Review and brief in support of its appeal within thirty days of the order. *Jones v. Old Ben Coal Co.*, BRB No. 88-4143 BLA (Mar. 11, 1991)(unpublished Order). Employer did not file any pleadings in response to this order, and on September 25, 1995, the Board issued an order to show cause why employer's appeal should not be dismissed as abandoned. *Jones v. Old Ben Coal Co.*, BRB No. 88-4143 BLA (Sept. 25, 1995)(unpublished Order). Employer did not respond to the order to show cause, and on January 17, 1996, the Board dismissed employer's appeal as abandoned. *Jones v. Old Ben Coal Co.*, BRB No. 88-4143 BLA (Jan. 17, 1996)(unpublished Order). On February 16, 1996, the Board received a letter and entry of appearance, dated February 11, 1996, on behalf of employer from Wayne R. Reynolds. In his letter, Mr. Reynolds indicated that employer had been acquired by Zeigler Holding Company, that Zeigler had not been served with a copy of the Board's September 25, 1995 show cause order, and that the claim file had only recently been received and the claim file located. Mr. Reynolds requested that the Board grant employer thirty days in which to file a brief in support of its appeal. The Board docketed the entry of appearance of Mr. Reynolds, but did not respond to his letter requesting a new briefing schedule. On February 12, 1997, Mark E. Solomons entered an appearance as employer's counsel.

In an Order dated March 8, 2002, the Board reinstated employer's appeal in BRB No. 88-4143 BLA upon employer's motion, directing employer to file a brief within thirty days. *Jones v. Old Ben Coal Co.*, BRB No. 88-4143 BLA (Mar. 8, 2002)(unpublished Order). Employer filed a timely brief. On appeal, employer contends that the administrative law judge erred in failing to conclude that the opinions of Drs. Black, Beck and Cooper were sufficient to establish rebuttal of the interim presumption under Section 727.203(b)(3) (2000), and improperly relied upon claimant's lay testimony to find rebuttal precluded thereunder. Employer also argues that if the evidence is found insufficient to establish rebuttal, the case must be remanded for employer to be allowed to develop additional evidence in light of the extremely long delays in the adjudication of this case and the

evolution of the standard for establishing subsection (b)(3) (2000) rebuttal over that time. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, urging the Board to reject employer's contentions and affirm the award of benefits. Employer has filed a reply brief reiterating its contentions in its Petition for Review and brief, and asserting for the first time that the evidence also establishes rebuttal of the interim presumption under Section 727.203(b)(2) (2000).[3]

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 finding that rebuttal was not established under Section 727.203(b)(3) (2000), employer contends that the administrative law judge improperly relied upon claimant's testimony about the miner's breathing difficulties, and erred in failing to find the opinions of Drs. Black, Beck and Cooper sufficient to establish rebuttal under subsection (b)(3) (2000). Employer's contention lacks merit.

[3]In its reply brief, employer contends that the evidence clearly establishes that the miner was not totally disabled and that, therefore, rebuttal has been established pursuant to 20 C.F.R. §727.203(b)(2) (2000). We decline to address this argument as employer failed to raise it at any prior point in the litigation of this case, raising it for the first time in its reply brief in the present appeal. *See Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395 (1982); *Kauzlarich v. Director, OWCP*, 4 BLR 1-744 (1982).

The United States Court of Appeals for the Seventh Circuit has held that the party opposing entitlement must prove that pneumoconiosis was not a contributing cause of the miner's total disability or death to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3). *See Old Ben Coal Co. v. Director, OWCP* [*Mitchell*], 62 F.3d 1003, 19 BLR 2-245 (7th Cir. 1995)*; Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995); *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1989). The party opposing entitlement must thus show that pneumoconiosis was in no way related to the miner's disability or death with evidence that rules out pneumoconiosis as a factor in the miner's disability or death.[4] *Id.*

[4]In his Decision and Order dated March 31, 1986, the administrative law judge required employer to prove that pneumoconiosis played no part in causing the miner's disability or death, citing *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985). Decision and Order at 2. In applying that standard, the administrative law judge effectively applied the "rule out" standard which was subsequently adopted by the Seventh Circuit in *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1989). In adopting the "rule out" standard, the Seventh Circuit in *Wetherill* cited the Sixth Circuit's decision in *Gibas*, noting that the Sixth Circuit rejected the Board's contrary decision in *Jones v. The New River Co.*, 3 BLR 1-199 (1981).

Employer argues that the opinions of Drs. Black and Cooper clearly establish subsection (b)(3) (2000) rebuttal because Dr. Black, who was the autopsy prosector, found only "incidental" anthracosis and because Dr. Cooper indicated that the miner had "minimal" pneumoconiosis. Director's Exhibits 11, 12. Employer further points to Dr. Black's indication that the miner's anthracosis was not totally disabling, Employer's Exhibit 1, and Dr. Cooper's statement that the miner's pneumoconiosis "should not cause any great degree of disability." Employer's Exhibit 3. In support of its argument that these opinions establish subsection (b)(3) (2000) rebuttal, employer relies upon the decisions of the Seventh Circuit in *Amax Coal Co. v. Beaseley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992) and *Amax Coal Co. v. Rehmel*, 993 F.2d 600, 17 BLR 2-91 (7th Cir. 1993). The medical opinions found to be sufficient to establish rebuttal under subsection (b)(3) (2000) in those cases, however, differ from the opinions of Drs. Black and Cooper in the instant case, as asserted by the Director, inasmuch as medical opinions in those two cases addressed the specific question of whether pneumoconiosis contributed to disability or death.[5] In the instant case, Drs. Black and

[5]In *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992), Dr. Sanjabi indicated that, if he "had to bet money on it," Beasley's pulmonary condition was due entirely to cigarette smoking. *Beasley* at 328, 16 BLR 2-49. The administrative law judge in *Beasley* found that such an opinion was equivocal. *Id.* The Seventh Circuit held that it is difficult to imagine a more convincing statement that the claimant's exposure to coal dust had little or nothing to do with his disability, and that while it was true that Dr. Sanjabi could not completely rule out pneumoconiosis as a possible factor in Beasley's condition, it was improper for the administrative law judge to use this "equivocation" as a basis for finding no rebuttal. *Id*. The medical opinion found to be sufficient to establish rebuttal under 20 C.F.R. §727.203(b)(3) (2000) in *Amax Coal Co. v. Rehmel*, 993 F.2d 600, 17 BLR 2-91 (7th Cir.

Cooper simply fail to address whether the miner's "incidental anthracosis" or "minimal" pneumoconiosis contributed, in whole or in part, to the miner's disability or death. Director's Exhibits 11, 12; Employer's Exhibits 1, 2. We affirm, therefore, the administrative law judge's finding that the opinions of Drs. Black and Cooper do not satisfy the standard for establishing rebuttal under Section 727.203(b)(3) (2000). *See Mitchell, supra; Witherill, supra;* Decision and Order at 2.

1993) – *i.e.*, an opinion from Dr. Warfel – was sufficient to establish rebuttal because Dr. Warfel affirmatively stated that the miner's pneumoconiosis neither contributed to the miner's death nor impaired his lungs during his life. *Rehmel*, at 601, 17 BLR 2-92. In the instant case, the opinions of Drs. Black and Cooper, unlike the aforementioned opinions in *Beasley* and *Rehmel*, simply do not address whether the miner's pneumoconiosis contributed to the miner's death or disability. Director's Exhibits 11, 12; Employer's Exhibits 1, 2.

Employer further contends that the administrative law judge erred in failing to find rebuttal established under subsection(b)(3) (2000) in light of Dr. Beck's report. We disagree. Employer notes that Dr. Beck diagnosed the miner with heart disease, stated that the miner "[had] been able to perform very well in his job," and did not indicate any diagnosis of pneumoconiosis or lung disease. In support of its contention that the lack of any mention of pneumoconiosis gives rise to a reasonable inference that none was present, employer relies on the decisions of the Seventh Circuit in *Bishop v. Peabody Coal Co.*, 690 F.2d 131, 5 BLR 2-13 (7th Cir. 1982) and *Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988). In *Bishop* and *Burns*, medical opinions which did not mention pneumoconiosis were held to be sufficient to support a finding that the miners in those two cases did not have pneumoconiosis, in light of significant other evidence existing in each case affirmatively indicating that the miners did not have the disease.[6] In the instant case, it is undisputed that

[6]In *Bishop v. Peabody Coal Co.*, 690 F.2d 131, 5 BLR 2-13 (7th Cir. 1982), the court held that the three medical opinions of record, which made no mention of pneumoconiosis, were sufficient to establish that the deceased miner had no lung disease whatsoever when taken together with the unanimously negative x-ray evidence of record and the death certificate, which likewise did not indicate any diagnosis of pneumoconiosis or a lung condition. Similarly, in *Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988), the court held that a complete report of the miner's physical condition which contained no diagnosis of

the miner had pneumoconiosis, and, therefore, the instant case is distinguishable from *Bishop* and *Burns*. We affirm the administrative law judge's finding that Dr. Beck's opinion does not rise to the level of establishing rebuttal under Section 727.203(b)(3) (2000). Accordingly, we affirm the administrative law judge's ultimate finding that employer failed to establish rebuttal pursuant to Section 7272.203(b)(3) (2000).[7] *See Mitchell, supra; Wetherill, supra.*

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pneumoconiosis nor any evidence supporting such diagnosis, but which attributed the deceased miner's respiratory symptoms to amyotrophic lateral sclerosis, was sufficient to rebut the presumption that the deceased miner was not partially or totally disabled by pneumoconiosis, since the extensive and detailed record in the case did not mention pneumoconiosis or any lung disease related to coal dust exposure. The court noted that the x-ray reports and pulmonary function studies, and the deceased miner's death certificate, did not indicate the presence of lung disease.

[7]Inasmuch as the administrative law judge properly found the medical evidence of record insufficient as a matter of law to support a finding of rebuttal pursuant to Section 727.203(b)(3) (2000), we find no merit in employer's contention that the administrative law judge improperly relied upon claimant's testimony with regard to her husband's breathing difficulties to preclude rebuttal. It is employer's burden to establish rebuttal of the interim presumption. *See Gilson v. Price River Coal Co.*, 6 BLR 1-96 (1983).

Employer also contends that, if its evidence is deemed insufficient to support a finding of subsection (b)(3) (2000) rebuttal, it should be afforded an opportunity to develop new evidence or be released from the case in light of the evolution of the standard for establishing rebuttal under subsection (b)(3) (2000). Employer notes that the Board held in *Jones v. The New River Co.*, 3 BLR 1-199 (1981), that the "in whole or in part" language of Section 727.203(b)(3) was invalid and should be disregarded.[8] Employer argues that the Seventh Circuit's 1987 decision in *Wetherill*, overruling the Board's decision in *Jones*, resulted in a manifest injustice to employer as it adopted a more stringent standard that employer had to meet to establish its burden. We disagree. As the Director states, employer developed its evidence under the same standard for establishing subsection (b)(3) (2000) rebuttal that applies today in the Seventh Circuit. *See Mitchell, supra; Wetherill, supra*. That is, when employer was developing its evidence and preparing its defense in this case, and when the hearing took place in 1980, the less strict standard set forth in the Board's decision in *Jones* had not yet been issued. Furthermore, the administrative law judge did not apply *Jones* in his 1986 Decision and Order on remand, but rather applied the stricter "in whole or in part" language of subsection (b)(3) (2000), citing the decision of the United States Court of Appeals for the Sixth Circuit in *Gibas, supra*. Decision and Order at 2. We, therefore, reject employer's contention that the application of the Seventh Circuit's decision in *Wetherill*, overruling the Board's decision in *Jones*, resulted in manifest injustice to employer in this case. We reaffirm, therefore, the administrative law judge's finding that rebuttal of the interim presumption was not established under Section 727.203(b)(3) (2000).

[8]20 C.F.R. §727.203(b)(3) (2000) provides for rebuttal if it is established that "the total disability or death of a miner did not arise in whole or in part out of coal mine employment...." 20 C.F.R. §727.203(b)(3) (2000). In *Jones v. The New River Co.*, 3 BLR 1-199 (1981), the Board invalidated the "in whole or in part" language of subsection (b)(3) (2000), holding that it impermissibly allowed benefits to claimants only partially disabled due to pneumoconiosis. The Board held that this was not in keeping with the Act, which requires that total disability due to pneumoconiosis be established. *See Jones* at 1-208, citing 30 U.S.C. §§901(a), 902(f)(1).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge