BRB Nos. 98-0542 BLA
and 98-0542 BLA-A

SHERRY LYNN HATCHER)
(Widow of MONTY MASSEY))
)
Claimant-Petitioner)
Cross-Respondent)
)
v.)
)
BETHLEHEM MINES CORPORATION)
)
Employer-Respondent)
Cross-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS') Date Issued: 7/28/99

COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

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

Hazel A. Straub, Charleston, West Virginia, for claimant.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

Jennifer U. Toth (Henry L. Solano, Solicitor of Labor, Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (81-BLA-1062) of Administrative Law Judge Clement J. Kichuk 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). In his initial Decision and Order dated December 27, 1984, Administrative Law Judge Glenn Robert Lawrence found that the miner established eighteen years of coal mine employment, and based on the filing date of January 18, 1980, applied the regulations found at 20 C.F.R. Part 727. Director's Exhibit 1. Judge Lawrence found that the miner established invocation of the interim presumption at 20 C.F.R. §727.203(a)(1), but found that employer had rebutted the presumption pursuant to 20 C.F.R. §727.203(b)(3). Judge Lawrence also found that his finding of rebuttal at Section 727.203(b)(3) precluded a determination of eligibility at 20 C.F.R. Part 410, Subpart D and 20 C.F.R. Part 718. Accordingly, benefits were denied. The miner appealed, and in *Massey v. Bethlehem Mines Corp.*, BRB No. 85-0168 BLA (Apr. 14, 1988)(unpub.), the Board affirmed Judge Lawrence's finding of invocation at Section 727.203(a)(1), but remanded the case for consideration of entitlement at 20 C.F.R. §410.490 pursuant to *Halon v. Director, OWCP*, 713 F.2d 21, 5 BLR 2-115 (3d Cir. 1983).

On remand, Judge Lawrence found invocation established at 20 C.F.R. §410.490(b)(1)(i), and as rebuttal was not established under Section 410.490(c), he awarded benefits. Employer appealed, and in *Massey v. Bethlehem Mines Corp.*, BRB No. 88-3348 BLA (Aug. 19, 1992)(unpub.), the Board vacated Judge Lawrence's award of benefits at Section 410.490, and reinstated the denial of benefits at Part 727 pursuant to *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 15 BLR 2-155 (1991). The miner filed a motion for reconsideration, which the Board granted in *Massey v. Bethlehem Mines Corp.*, BRB No. 88-3348 BLA (Aug. 6, 1996).[1]

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[1] The miner died on October 31, 1993. Claimant's Exhibit 12.

The Board vacated Judge Lawrence's August 19, 1992 Decision and Order and remanded the case for reconsideration of Dr. Zaldivar's opinion at Section 727.203(b)(3) in light of recent law in the United States Court of Appeals for the Fourth Circuit.[2] On remand, Administrative Law Judge Clement J. Kichuck (the administrative law judge) found that employer established rebuttal at Section 727.203(b)(3). Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in finding rebuttal established at Section 727.203(b)(3). Employer responds, urging affirmance of the administrative law judge's Decision and Order. Employer also cross- appeals, contending that if this case is remanded for any reason, the administrative law judge should be instructed to reopen the record to allow the parties an opportunity to address new legal standards and to allow new medical evidence. The Director, Office of Workers' Compensation Programs, responds, stating only that he has no objection to reopening the record if the administrative law judge's decision is vacated and the case remanded.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

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[2]The instant case arises within the jurisdiction of the United States Court of Appeals Fourth Circuit inasmuch as the miner's coal mine employment occurred in West Virginia. Unmarked Exhibit; *see Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*).

Claimant appeals, contending that the administrative law judge erred in crediting the medical opinion of Dr. Zaldivar, and erred in failing to credit the medical findings of Dr. Lee, as well as those of the West Virginia Occupational Pneumoconiosis Board.[3] Claimant specifically contends that under the law of the Fourth Circuit, Dr. Zaldivar's opinion must be given little weight, as his finding of

[3]Dr. Zaldivar found no evidence of coal workers' pneumoconiosis based upon his own x-ray reading and upon his review of all the medical evidence, and found that the miner did not suffer from a significant pulmonary impairment. Dr. Zaldivar also stated that the miner's impairment was due to heart disease unrelated to mine work. He further stated that from a pulmonary standpoint, the miner was capable of performing all mine work for which he was trained, but from a cardiac standpoint, he was significantly impaired. Employer's Exhibit 1. Dr. Lee found coal workers' pneumoconiosis, and that the miner was totally and permanently disabled from participating in his usual coal mine work as a result of a pulmonary impairment arising from coal mine employment. Dr. Lee concluded that the miner was totally disabled by a pulmonary impairment which resulted from his coal mine employment. Claimant's Exhibits 3, 8, 11. Dr. Walker, of the West Virginia Occupational Pneumoconiosis Board, found that the miner had a 15% pulmonary functional impairment attributable to occupational pneumoconiosis. Director's Exhibit 17.

no evidence of pneumoconiosis is at odds with the administrative law judge's finding that pneumoconiosis was present. We disagree. The administrative law judge weighed all of the medical opinions and accorded greater weight to Dr. Zaldivar's medical opinion over Dr. Lee's opinion because of Dr. Zaldivar's superior qualifications and because his opinion rests upon a detailed analysis of all the objective medical data, and is supported by the opinions of Drs. Santos, Selinger and Rectanwald.[4] Decision and Order on Remand at 14-17. Specifically, the administrative law judge stated that he credited Dr. Zaldivar because he fully explained the bases for his opinion that the miner was disabled by his cardiac condition. *Id.* at 19. The administrative law judge found that Dr. Zaldivar gave a "full explanation of the miner's respiratory and pulmonary condition alongside the miner's undisputed heart problems and arrives at a well reasoned medical opinion as to the causality of the miner's total physical disability." *Id.*

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[4]Dr. Santos diagnosed chronic obstructive pulmonary disease and arteriosclerotic heart disease, but found no pneumoconiosis, and indicated that the diagnosed conditions were not related to dust exposure from coal mine employment. Director's Exhibit 9. Dr. Rectanwald stated that the miner was completely disabled on a cardiac basis. Director's Exhibit 7. Dr. Selinger diagnosed coronary artery disease and stated that the miner was totally disabled. Director's Exhibit 8.

The United States Court of Appeals for the Fourth Circuit has held that in order to establish rebuttal pursuant to Section 727.203(b)(3), the party opposing entitlement must rule out any causal connection between a miner's total disability and his coal mine employment. *Bethlehem Mines Corp. v. Massey,* 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). In *Grigg v. Director, OWCP,* 28 F.3d 416, 18 BLR 2-301 (4th Cir. 1994), the Fourth Circuit held that where the fact finder has already found the existence of pneumoconiosis established under Section 727.203(a)(1), medical opinions premised upon a finding of no pneumoconiosis were not worthy of much, if any, weight at rebuttal. The court stated that although it need not go so far as to hold that such an opinion is without probative value, it did not have enough force to satisfy *Massey*. The Fourth Circuit has subsequently indicated that where a physician's opinion regarding the existence of coal workers' pneumoconiosis is at odds with the administrative law judge's finding on that matter, it may nonetheless be probative on the issue of the cause of disability if the physician's opinion on the existence of pneumoconiosis is independent of his findings regarding the presence and cause of a respiratory impairment. *See, e.g., Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Dehue Coal Co. v. Ballard,* 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co.,* 45 F.3d 790, 19 BLR 2-86 (4th Cir. 1995).[5] In this case, the administrative law judge acted within his discretion in

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[5] In *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 790, 19 BLR 2-86 (4th Cir. 1995), a Part 718 case, the court stated that the opinions of two doctors who found that the miner did not suffer from coal workers' pneumoconiosis were not in conflict with the administrative law judge's finding of the *existence* of pneumoconiosis since both doctors found that the miner suffered from respiratory problems arising out of coal mine employment. Thus, the court rejected the miner's contention that the doctors premised their conclusions upon a finding of no pneumoconiosis.

The court subsequently held, in another Part 718 case, that once an administrative law judge has found that the "miner suffers from some form of pneumoconiosis," a medical opinion premised upon an understanding that the miner does not have *coal workers'* pneumoconiosis may have probative value. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). The court stated that a medical opinion that acknowledges the miner's respiratory or pulmonary impairment, but concludes that an ailment other than pneumoconiosis caused the total disability is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to the disability. *Id.*

Recently, the court elaborated further in *Piney Mountain Coal Co v. Mays,* 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999), holding that although the *Grigg* rule is

crediting Dr. Zaldivar's opinion on the issue of respiratory impairment as the administrative law judge reasonably found that the physician's discussion of the cause of the miner's respiratory impairment (the heart disease), did not rely on an assumption of no pneumoconiosis.[6] *Id.*; Decision and Order on Remand at 15-17.

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sound, the later cases have explained that it must be applied with an ear sensitive to conflicting meanings ascribed to the same words by lawyers and doctors, as well as to idiosyncratic differences in phraseology among doctors themselves. The court stated that between doctors and lawyers, the most common of these conflicts is the stark disparity between the clinical definition of pneumoconiosis and the broader legal meaning of the term. Thus, the court indicated that in applying the *Grigg* rule, the focus should be on the descriptive facts and opinions of a doctor and not upon whether his use of some medical term of art agrees with the administrative law judge's use of some legal term of art.

[6]Furthermore, we reject claimant's contention that the administrative law judge erred in using Dr. Santos's opinion to support Dr. Zaldivar's opinion, as the administrative law judge permissibly accorded greater weight to Dr. Zaldivar's opinion on the basis of his qualifications. *See Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)*(en banc)*.

Claimant contends that the administrative law judge erred in crediting Dr. Zaldivar's opinion because it is flawed due to his erroneous belief that the miner's blood gas studies were normal and because he did not show a knowledge of the miner's work duties. We reject claimant's contentions, as the administrative law judge permissibly determined that Dr. Zaldivar's opinion was sufficient to rule out pneumoconiosis as a cause of disability pursuant to *Massey*. Moreover, knowledge of a miner's work duties and blood gas studies does not speak to the source disability. Furthermore, we reject claimant's contention that Dr. Zaldivar's opinion is insufficient to establish rebuttal at Section 727.203(b)(3) under *Cox v. Shannon-Pocahontas Mining Co.,* 6 F.3d 190, 18 BLR 2-31 (4th Cir. 1993), as Dr. Zaldivar indicated that the miner's impairment was entirely due to his heart disease which was unrelated to his mine work, but which was due to his arteriosclerotic vascular disease.[7] As the administrative law judge permissibly accorded greater weight to Dr. Zaldivar's opinion based on his superior qualifications as a board-certified pulmonologist and internist, we affirm his weighing of this opinion. *See Milburn Colliery Co. v. Hicks,* 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

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[7]In *Cox v. Shannon-Pocahontas Mining Co.,* 6 F.3d 190, 18 BLR 2-31 (4th Cir. 1993), the court held that a medical opinion in which a physician stated that a miner's coal mine employment did not contribute to the miner's cardiac disease or his diabetes did not rule out a causal relationship between the miner's disability and his coal mine employment. The court also indicated that a physician's finding that a miner is not totally disabled due to his pulmonary impairment alone is not sufficient to meet the *Massey* standard. *See Cox, supra.*

Claimant also contends that the administrative law judge improperly discounted the opinion in which Dr. Lee found that the miner was totally disabled due to pneumoconiosis, and erred in failing to address Dr. Lee's more recent 1983 and 1984 reports. Claimant's Exhibits 3, 8, 11. Contrary to claimant's contention, the administrative law judge considered all of Dr. Lee's relevant reports.[8] Decision and Order on Remand at 6, 7, 18; Claimant's Exhibits 4, 11. The administrative law judge determined that although Dr. Lee diagnosed heart impairment and coronary artery disease, he failed to discuss how these conditions may have impacted the miner's respiratory and pulmonary systems.[9] Decision and Order on Remand at 18. Furthermore, the administrative law judge determined that Dr. Lee failed to explain why studies supporting different conclusions by other physicians should not be fully considered or credited, and concluded that his opinion is "untenable." *Id.* The administrative law judge therefore properly found that the opinion of Dr. Zaldivar outweighed the opinions of all the other physicians, including those of Dr. Lee. *See Hobbs, supra; Hicks, supra; Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994).

Claimant further contends that the West Virginia Occupational Pneumoconiosis Board's finding of 15% pulmonary functional impairment attributable to occupational pneumoconiosis supports the opinion of Dr. Lee, and argues that the administrative law judge erred in failing to discuss the fact that the blood gas study and positive x-ray reading give greater credibility to Dr. Lee's report and that of the Pneumoconiosis Board, rather than Dr. Zaldivar's opinion. The administrative law judge, however, permissibly accorded little weight to the findings of the Pneumoconiosis Board, as there was no indication as to the qualifications of the physicians who performed the examination, or what background information or clinical tests were included. Decision and Order on Remand at 11; *Carson, supra;* Director's Exhibit 3. Therefore, the administrative law judge need not have considered whether their findings are supported by any

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[8] Dr. Lee issued a letter in 1983 in which he reviewed the results of various spirometric tests. Dr. Lee rendered no opinion as to extent or cause of disability. Claimant's Exhibit 8.

[9] The administrative law judge noted that this "significant omission is magnified by the opinions of Drs. Rectanwald, Selinger, Santos and Zaldivar, who unvaryingly found the miner was totally disabled from his heart disease." Decision and Order on Remand at 18. The administrative law judge noted that Dr. Lee was the only physician of record to conclude that the miner was totally disabled due to pneumoconiosis. *Id.*

other evidence in the record.

As we affirm the administrative law judge's according greater weight to Dr. Zaldivar's opinion over the other medical opinions, he properly found that employer established rebuttal at Section 727.203(b)(3), and we affirm the denial of benefits.[10] As we affirm the denial of benefits, we need not address employer's cross-appeal regarding the reopening of the record.

Accordingly, the Decision and Order on Remand - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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[10] The administrative law judge's finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(3) precludes a finding of entitlement under 20 C.F.R. Part 410, Subpart D. *See Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985).