

BRB No. 03-0455 BLA

PERRY A. YOST)
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 Claimant-Respondent)
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 v.)
)
 ISLAND CREEK COAL COMPANY) DATE ISSUED: 03/05/2004
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 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Second Decision and Order On Remand Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Perry A. Yost, Richlands, Virginia, *pro se*.

Kathy L. Snyder and Dorothea J. Clark (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Second Decision and Order On Remand Awarding Benefits (98-BLA-00684) of Administrative Law Judge Daniel F. Sutton rendered 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 claim has a lengthy procedural history which was set forth in the Board's most recent Decision and Order in this case. *Yost v. Island Creek Coal Co.*, BRB No. 00-1073 BLA (Sep. 19, 2001)(unpub.). In that decision, the Board vacated the administrative law judge's award of benefits. Although the Board affirmed the administrative law judge's finding of pneumoconiosis, it remanded the case for the administrative law judge to consider disability causation under the revised regulation at 20 C.F.R. §718.204(c) and to reconsider the medical opinion evidence on the issue of disability causation. On remand, the administrative law judge, citing *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995) and *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), discounted the opinions of employer's physicians, *i.e.*, Drs. Endres-Bercher, Stewart, Fino, Tuteur and Chillag, that claimant's disability was not due to coal mine employment, because they failed to diagnose the existence of pneumoconiosis. The administrative law judge credited the opinions of Drs. McVey and Sutherland and found that disability causation was established. Accordingly, benefits were awarded. The administrative law judge denied employer's motion for reconsideration.

On appeal, employer argues that the administrative law judge erred in: retroactively applying the amended regulations to this claim; applying case law, *i.e.*, *Scott* and *Toler*, to this case which is factually distinguishable; refusing to remand the case for the development of additional evidence; and applying case law, *i.e.*, *Scott*, which is "fatally flawed." Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, (the Director) also responds, urging affirmance of the award of benefits inasmuch as the Board previously affirmed the administrative law judge's application of the revised regulations. The Director also asserts that the administrative law judge properly accorded less weight to the opinions of doctors who based their causation findings on the absence of pneumoconiosis, and argues that remand of the case for further development of the evidence is not warranted in this case and that the administrative law judge properly applied *Scott*, a decision of the United States Court of Appeals for the Fourth Circuit, because the instant claim arises within that court's jurisdiction.²

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, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² Because claimant's most recent coal mine employment took place in the Fourth Circuit, we apply the law of the United States Court of Appeals for the Fourth Circuit to this case. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989).

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).

At the outset, employer concedes that the Board previously determined that the amended regulations were applicable to this claim. Employer nonetheless, however, requests that the Board reconsider the issue and argues that the administrative law judge erred in retroactively applying the amended regulations to this claim because they alter the criteria under which claims are evaluated and impose new burdens on employer. In applying the amended regulations to this case, the administrative law judge found that he was without authority to deviate from the Board's holding that the amended regulations were applicable. We will not, therefore, revisit the issue. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990).

Employer next argues that the administrative law judge erred in applying the Fourth Circuit's decisions in *Toler* and *Scott* to reject the opinions of Drs. Endres-Bercher, Stewart, Fino, Tuteur, and Chillag, inasmuch as those doctors found claimant to have symptoms consistent with legal pneumoconiosis. In *Toler* and *Scott*, the Fourth Circuit held that where the administrative law judge found the existence of both clinical and legal pneumoconiosis, he may not use the opinions of physicians who directly contradict him on the existence of pneumoconiosis to prove that disability causation has not been established, even though they opine that their opinions would not have changed if claimant suffered from pneumoconiosis.

In this case, the administrative law judge found the existence of clinical and legal pneumoconiosis to have been established. Administrative Law Judge's 2000 decision at 11, 13. The administrative law judge could, therefore, give little weight to the opinions of Drs Endres-Bercher, Stewart, Fino, Tuteur, and Chillage, who found that claimant did not have "medical" pneumoconiosis or "any condition aggravated by coal dust exposure or any symptoms related to coal dust exposure," *i.e.*, legal pneumoconiosis, 20 C.F.R. §718.201, pursuant to *Scott* and *Toler*. Administrative Law Judge's Second Decision and Order on Remand at 9. We reject employer's attempt to distinguish the present case from *Scott* and *Toler* by arguing that inasmuch as its doctors found "symptoms" consistent with legal pneumoconiosis they did not contradict the administrative law judge's findings of clinical and legal pneumoconiosis. The relevant facts in the case at bar are nearly identical to those in *Scott* and *Toler*: "[employer's doctors] opined that [claimant] did not have legal or medical pneumoconiosis, did not diagnose any condition aggravated by coal dust, and found no symptoms related to coal dust exposure" (emphasis supplied). *Scott*, 289 F.3d at 270, 22 BLR at 383-84. Thus, the administrative law judge rationally discounted their opinions in light of *Scott* and *Toler*.

Employer next argues that the administrative law judge erred in refusing to remand the case for the development of additional evidence in order to allow the parties to develop evidence in accordance with the new standard on causation, resulting from the Fourth Circuit's decision in *Scott*. In finding that *Scott* had not changed the law, the administrative law judge stated that even if "*Scott* had never been issued I would have made precisely the same findings and conclusions based on *Toler*." 2003 Administrative Law Judge's decision at 5. In *Scott*, the Fourth Circuit, applying *Toler*, held that opinions that claimant did not have legal or clinical pneumoconiosis or any condition aggravated by coal dust exposure or symptoms related to coal dust were entitled to "little weight" where the administrative law judge had in fact found the existence of clinical and legal pneumoconiosis. In *Scott*, therefore, the Fourth Circuit merely clarified the existing law set forth in *Toler*. Thus, the administrative law judge's finding that there was no change in law requiring remand of the case for the development of additional evidence is affirmed and employer's argument in this regard is rejected.

Finally, employer argues that the administrative law judge erred in applying *Scott* to the instant claim because it was fatally flawed inasmuch as the finding of pneumoconiosis in *Scott* was based on application of the "true doubt rule" which was subsequently invalidated. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Employer asserts, therefore, that, since a legally valid finding of pneumoconiosis was never made in *Scott*, the administrative law judge could not reject causation opinions which went against the finding of pneumoconiosis. In response, the Director contends that employer's argument is without merit because the administrative law judge has no authority to determine that *Scott* is incorrect, and refuse to apply it. Further, as the Director points out, inasmuch as the employer in *Scott* never challenged the administrative law judge's pneumoconiosis finding, even after *Ondecko* was decided, *Scott*, 289 F.3d at 265 n.1, the employer effectively conceded the existence of pneumoconiosis. Employer's argument is, accordingly, rejected and the administrative law judge's finding that *Scott* was controlling precedent in this case is affirmed.

Accordingly, the administrative law judge's Second Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge