

BRB No. 00-1170 BLA

ESTATE of MATTIE V. LEWIS)
(Deceased Widow of HAROLD E. LEWIS))
)
 Claimant-Petitioner)
)
 v.)
)
)
)
 MINERAL DEVELOPMENT COMPANY)
)
 Employer-Respondent) DATE ISSUED: _____
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)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge,
United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington,
D.C., for employer.

Jennifer U. Toth (Howard M. Radzely, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY,
Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (97-BLA-0693 and 97-BLA-0694) and the Order Denying Motion for Reconsideration of Administrative Law Judge Stuart A. Levin denying benefits on a miner's 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). This claim is before the Board for the fourth time. Most recently, the Board affirmed Administrative Law Judge George P. Morin's denial of benefits on the survivor's claim, but remanded the case for him to reconsider his denial of benefits on the miner's claim. *See Lewis v. Mineral Development Co.*, BRB No. 98-0962 BLA (Apr. 13, 1999)(unpub.). Specifically, the Board vacated Judge Morin's 20 C.F.R. §727.203(b)(3) finding of rebuttal of the interim presumption and instructed the administrative law judge on remand to consider all the relevant evidence pursuant to this section in accordance with *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). *See Lewis, supra.*

On remand, this case was transferred to Judge Levin (hereinafter, the administrative law judge) who found that employer established rebuttal pursuant to Section 727.203(b)(3). Decision and Order at 11-12. Accordingly, benefits were denied. Claimant filed a timely request for reconsideration of the administrative law judge's denial. On reconsideration, the

¹Claimant is Harold W. Lewis, son of the miner's widow and the miner. Survivor's Claim-Director's Exhibits 10-11. The miner filed his claim on March 9, 1978 and, subsequently, died on December 3, 1991. Director's Exhibits 1, 119. Claimant is pursuing the miner's claim on behalf of his mother's estate.

²The 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

administrative law judge rejected claimant's assertion that case law of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, requires that a physician "use the precise language 'rule out' in assessing the etiology of a [miner's] impairment." Order Denying Motion for Reconsideration at 2. The administrative law judge, therefore, again concluded that employer established Section 727.203(b)(3) rebuttal based on the opinions of Drs. Tuteur, Kleinerman, and Frost. *Id.*

On appeal, claimant contends that the administrative law judge erred in finding the opinions of Drs. Tuteur, Kleinerman, and Frost sufficient to establish rebuttal pursuant to Section 727.203(b)(3). Claimant's Brief at 7-12. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 727.203(b)(3), in his Decision and Order and Order Denying Motion for Reconsideration, the administrative law judge found that "[e]mployer has met its burden of proof in establishing that there was no causal connection between claimant's total disability or death and his coal mine employment" based on the opinions of Drs. Frost, Kleinerman, and Tuteur. Decision and Order at 11-12. Claimant first asserts, citing *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984) and *Turner v. Director, OWCP*, 927 F. 2d 778, 15 BLR 2-6 (4th Cir. 1991), that "a non-examining physician's opinion is insufficient as a matter of law to rebut an interim presumption unless based on matters addressed by an examining physician." Claimant's Brief at 7-8. Therefore,

³Employer again asserts that this appeal should be dismissed for lack of an interested party. Employer's Brief at 2-3. The Board addressed this issue in its Decision and Order in claimant's previous appeal and held that there is ample evidence demonstrating that counsel is pursuing this case at the behest of the family of the deceased miner's widow. *See Lewis v. Mineral Development Co.*, BRB No. 98-0962 BLA, *slip op.* at 2 n.2 (Apr. 13, 1999)(unpub.). Because employer has not set forth any valid exception to the law of the case doctrine, we adhere to our previous holding regarding this issue. *Id.*; *see U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *see also Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(2-1 opinion with Brown, J., dissenting).

⁴The regulations contained in 20 C.F.R. Part 727 are not affected by the recent amendments to the regulations.

claimant further asserts that because Drs. Kleinerman, Frost, and Tuteur, all non-examining physicians, do not discuss any examining physician's opinion, their opinions are insufficient as a matter of law to establish Section 727.203(b)(3) rebuttal. *Id.*

In *Massey*, the Fourth Circuit court held that “[a] *non-examining* physician’s opinion on matters not addressed by *examining* physicians is insufficient as a matter of law to rebut an interim presumption under 20 C.F.R. § 727.203.” *Massey*, 736 F.2d at 125, 7 BLR at 2-83 (emphasis in original). In *Massey*, the Fourth Circuit court stated that rebuttal could not be established based on a non-examining physician’s opinion, stating that the miner’s disability was due to his smoking, when none of the examining physicians addressed the possibility that smoking caused the miner’s disability. The facts of the instant case are distinguishable from the facts in *Massey*. In the present case, the administrative law judge relied on the opinions of Dr. Frost, who supervised Dr. Pennington’s performance of the miner’s autopsy, Dr. Kleinerman, who reviewed the autopsy slides, and Dr. Tuteur, who reviewed the medical evidence of record, to find Section 727.203(b)(3) rebuttal established. Contrary to claimant’s assertion, while Drs. Frost, Kleinerman, and Tuteur did not “examine” the miner, these physicians based their opinions on matters addressed by the physicians who did examine the miner. *See Massey, supra; see also Turner, supra.*

The physicians whose medical opinions the administrative law judge relied upon stated the following. Dr. Frost found that the “micronodular lesions of simple coal workers’ pneumoconiosis played no role in causing [the miner’s] death.” Unmarked Exhibit. Moreover, Dr. Frost stated that the miner’s “death was due to his cardiovascular disease” and that the miner “also had micronodular cirrhosis of his liver.” *Id.* Dr. Kleinerman opined that the miner had simple coal workers’ pneumoconiosis, that “[c]oal workers’ pneumoconiosis did not contribute in anyway [sic] nor [sic] did not hasten [the miner’s] death,” and that the miner “was not disabled in anyway [sic] due to his mild to moderate degree of simple coal workers’ pneumoconiosis.” Director’s Exhibit 123. Dr. Kleinerman attributed the miner’s disability and death to his severe cardiac disease. *Id.* Dr. Tuteur found that the medical “reports define very early, very mild simple coal workers’ pneumoconiosis” and agreed with Dr. Kleinerman that “the coal workers’ pneumoconiosis present here was neither sufficient to produce disability nor sufficient to contribute as a cause to [the miner’s] death.” Director’s Exhibit 124. Dr. Tuteur further stated:

[The miner] died with and because of advanced organic heart disease due to both rheumatic valvular disease and coronary artery sclerotic disease, a condition adversely affected by his alcoholic cirrhosis and associated liver failure. These conditions are not related to, not aggravated by, and not caused by the inhalation of coal mine dust or the development of coal workers’ pneumoconiosis.

Id.

The examining physicians, Drs. Renn, Sontheimer, Coughlin, and Goldblatt, discussed

the extent to which the miner's heart disease, liver disease, diabetes, and exogenous obesity affected his health. Director's Exhibits 31, 36, 37, and 119. Accordingly, we reject claimant's assertion inasmuch as Drs. Frost, Kleinerman, and Tuteur based their opinions on matters addressed by the physicians who did examine the miner. *See Massey, supra; see also Turner, supra.*

Claimant next asserts that the opinions of Drs. Frost, Tuteur, and Kleinerman are insufficient as a matter of law to establish rebuttal at Section 727.203(b)(3) because these opinions do not "rule out" pneumoconiosis as the cause of the miner's disability or attribute any impairment present to sources other than coal mine employment. Claimant's Brief at 8-12. In his Decision and Order, the administrative law judge stated that the opinions of Drs. Kleinerman, Tuteur, and Frost establish Section 727.203(b)(3) rebuttal because these physicians "concluded that the pneumoconiosis found on autopsy was asymptomatic, played no role in [the miner's] death, nor contributed to his disability in any way, and there is no credible contrary medical interpretation of the autopsy evidence in this record." Decision and Order at 11. In his Order Denying Motion for Reconsideration, the administrative law judge stated that while Dr. Tuteur did not use the specific words "rule out" in his opinion, the physician's findings are tantamount to a finding that pneumoconiosis can be "ruled out" as a cause of the miner's respiratory impairment. Order Denying Motion for Reconsideration at 2. The administrative law judge also found Dr. Tuteur's opinion to be supported by the opinions of Drs. Kleinerman and Frost to establish that pneumoconiosis played no role in the miner's death or disability. *Id.*

In order to establish rebuttal pursuant to Section 727.203(b)(3) in this Fourth Circuit case, employer must establish that the total disability and death of the miner did not arise in whole or in part out of coal mine employment. *See Massey, supra; see also Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). More recently in *Lockhart*, the Fourth Circuit stated that it is employer's burden to show unequivocally that the miner had no respiratory impairment or to specifically rule out pneumoconiosis as a cause of any impairment that the miner may have had. In *Lockhart*, the Fourth Circuit also stated that Section 727.203(b)(3) rebuttal can be established by evidence that "explains all of any impairment present and attributes it solely to

⁵Contrary to claimant's assertion, a physician need not use the exact words "rule out," when assessing the etiology of the miner's impairment and death, for his/her opinion to be sufficient to satisfy 20 C.F.R. §727.203(b)(3) rebuttal. *See generally Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999)("focus should be on the descriptive facts and opinions of a doctor and not upon whether his use of some medical term of art jibes with the ALJ's use of some legal term of art").

⁶Claimant does not contest the administrative law judge's discrediting of the contrary medical opinion evidence in the record.

sources other than coal mine employment.” See *Lockhart, supra*, citing *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995).

As noted above, regarding the cause of the miner’s death, Dr. Kleinerman stated that coal workers’ pneumoconiosis did not contribute or hasten the miner’s death in any way. Director’s Exhibit 123. Dr. Tuteur found that the pneumoconiosis present was not sufficient to contribute as a cause to the miner’s death. Director’s Exhibit 124. Dr. Frost opined that pneumoconiosis “played no role” in causing the miner’s death. Unmarked Exhibit. Therefore, the opinions of Drs. Kleinerman, Tuteur, and Frost are sufficient to establish that pneumoconiosis played no role in the miner’s death. See *Massey, supra*; see also *Grigg, supra*; *Marcum, supra*.

Regarding the cause of the miner’s disability, Dr. Kleinerman opined that the miner “was not disabled in anyway [sic] due to his mild to moderate degree of simple coal workers’ pneumoconiosis.” Director’s Exhibit 123. Dr. Tuteur stated that the coal workers’ pneumoconiosis present was not sufficient to produce disability. Director’s Exhibit 124. Dr. Frost did not offer an opinion as to the role, if any, pneumoconiosis played in the miner’s disability. Thus, inasmuch as the opinion of Dr. Kleinerman attributes any impairment the miner had to sources other than coal mine employment by stating that the miner was not disabled by his coal workers’ pneumoconiosis, it is sufficient to establish Section 727.203(b)(3) rebuttal pursuant to *Lockhart*. See *Lockhart, supra*, citing *Ballard, supra*. The opinion of Dr. Tuteur is sufficient to “rule out” pneumoconiosis as the cause of the miner’s disability in accordance with *Massey*. See *Massey, supra*; see also *Grigg, supra*; *Marcum, supra*.

In light of the foregoing, we hold that, contrary to claimant’s contentions, the administrative law judge properly found that employer established rebuttal of the interim presumption pursuant to Section 727.203(b)(3) based on the opinions of Drs. Kleinerman, Tuteur, and Frost. See *Lockhart, supra*; *Massey, supra*; see also *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

REGINA C. McGRANERY

Administrative Appeals Judge