BRB No. 93-2179 BLA

JEWELL MAY (Widow of DIXIE MAY) Claimant-Petitioner v. J & H COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents 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 Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher (Wolfe & Farmer), Norton, Virginia, for claimant.

Sirina Tsai (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (90-BLA-0532) of Administrative

Law Judge Clement C. Kichuck denying benefits on claims 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). Regarding the miner's claim, the administrative law judge determined that J & H Coal Company is the responsible operator, credited the deceased miner with fifteen years of coal mine employment, and found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(1) but rebuttal established at Section 727.203(b)(3). Accordingly, he denied the miner's claim. Regarding the survivor's claim, the administrative law judge found no entitlement pursuant to Section 718.205(c) because he concluded that "the miner was not disabled at least in part by pneumoconiosis and his demise was not caused by pneumoconiosis." Decision and Order at 24.

On appeal, claimant contends that the administrative law judge erred in finding rebuttal established at Section 727.203(b)(3) and no entitlement at Section 718.205(c). Employer responds, contending that the administrative law judge erred by applying the true doubt rule to find invocation at Section 727.203(a)(1), but urging affirmance of the Decision and Order in light of the rebuttal finding. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

Employer contends that the administrative law judge erred by applying the true doubt rule. Employer's Brief at 16-17. Subsequent to the administrative law judge's Decision and Order, the true doubt rule was invalidated by the United States Supreme Court. *See Director, OWCP v. Greenwich Collieries* [Ondecko], U.S. , 114 S.Ct. 2251, 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). The administrative law judge's error is harmless, however, *see Larioni v. Director,* OWCP, 6 BLR 1-1276 (1984), because he permissibly credited the autopsy prosector's diagnosis of moderate anthracosis over the opinions of reviewing physicians who found no pneumoconiosis; the administrative law judge found that the prosector's opinion was "closest to the true diagnosis of both lungs." Decision and Order at 23; *see Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-27 (1991); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). Thus, substantial evidence supports the administrative law judge's finding of invocation at Section 727.203(a)(1), which we therefore affirm.

Claimant contends that the administrative law judge failed to apply the proper legal standard in determining that rebuttal was established pursuant to Section 727.203(b)(3). Claimant's Brief at 4-5. Claimant's argument has merit. The United States Court of Appeals for the Fourth Circuit, wherein jurisdiction of this case arises, places the affirmative burden of proof on the party challenging entitlement to produce persuasive evidence that "rules out" any causal connection between total disability and coal mine employment. *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *see Borgeson v. Kaiser Steel Corp*., 12 BLR 1-169 (1989)(*en banc*); *Lattimer v. Peabody Coal Co*., 8 BLR 1-509 (1986).

In the instant case, the administrative law judge did not determine whether the evidence ruled out such a causal connection but instead shifted the burden of proof to claimant to establish that "the [miner's] total disability was due to pneumoconiosis, or [that he was] totally disabled due to pneumoconiosis at the time of his death . . . ." Decision and Order at 17. Viewing the evidence from this perspective, the administrative law judge found that the miner's respiratory impairment was "caused mainly by his cigarette smoking abuse and by his cardiovascular disease," a finding which does not rule out a connection between the miner's respiratory disability and his coal mine employment. Decision and Order at 21; *see Cox v. Shannon-Pocahontas Mining Co*., 6 F.3d 190, 18 BLR 2-31 (4th Cir. 1993); *Massey, supra*; *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993). Accordingly, we vacate the administrative law judge's finding at Section 727.203(b)(3) and remand the case for him to reweigh the evidence under the *Massey* "rule-out" standard.

Claimant further contends that the administrative law judge erred in finding that the autopsy prosector's diagnosis of moderate anthracosis constituted a diagnosis of "mild pneumoconiosis." Claimant's Brief at 9. We agree. In crediting the autopsy prosector's finding of moderate anthracosis, the administrative law judge stated that this diagnosis was "consistent with the Court's conclusion that the miner suffered from mild pneumoconiosis which did not contribute" to his respiratory impairment or death. Decision and Order at 23. Because the administrative law judge substituted his judgment for that of the autopsy prosector, *see Marcum v. Director, OWCP*, 11 BLR 1-23 (1987), and has not indicated what evidence he relied on to find that the miner's pneumoconiosis was mild, we vacate this finding.

Claimant also contends that the administrative law judge failed to consider that Drs. Dahhan and Tuteur, reviewing physicians to whose opinions he accorded more weight, diagnosed that the miner did not have pneumoconiosis, whereas the administrative law judge found the existence of pneumoconiosis established by the prosector's opinion. Claimant's Brief at 17-18; Director's Exhibit 65; Decision and

Order at 23. The Fourth Circuit has held that if a physician finds no pneumoconiosis, his or her finding of no respiratory impairment due to pneumoconiosis is "not worthy of much, if any, weight" and cannot satisfy the *Massey* standard. *Grigg v. Director, OWCP*, 28 F.3d 416, 419-20, 18 BLR 2-299, 2-306-07 (4th Cir. 1994). Accordingly, we instruct the administrative law judge on remand to consider the sufficiency of those medical opinions of record that find no respiratory impairment and no pneumoconiosis in light of *Grigg*.[3] *See Adkins v. Dept. of Labor*, 824 F.2d 287, 10 BLR 2-172 (4th Cir. 1987); *Trujillo v. Kaiser Steel Corp*., 8 BLR 1-472 (1986).

Claimant further contends that the administrative law judge impermissibly discredited the opinion of the miner's treating physician merely because he was less qualified than the other physicians. Claimant's Brief at 7. We reject claimant's argument because the administrative law judge may, but is not required to, credit a treating physician, *see Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993), and may accord greater weight to the opinions of more highly qualified physicians, *see Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*).

Claimant also contends that the administrative law judge selectively analyzed the evidence by discrediting the opinion of Dr. Robinette merely because he was a reviewing physician, while not discrediting the opinions of employer's reviewing physicians for the same reason. Claimant's Brief at 13. We reject this contention; the administrative law judge accorded less weight to Dr. Robinette's report because he found that Dr. Robinette had relatively less material upon which to base his review than the other physicians, a determination within the administrative law judge's discretion. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Claimant contends that the administrative law judge failed to consider that Drs. Abernathy, Tuteur, Dahhan, and Stewart did not explain their opinions of no respiratory disability in light of the qualifying pulmonary function studies.[4] Claimant's Brief at 10, 17-18, 20. We reject claimant's contention, inasmuch as the administrative law judge discredited Dr. Abernathy's opinion as inadequately explained for failing to address the qualifying pulmonary function studies and did not rely on it. Decision and Order at 22; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Further, the other physicians explained their diagnoses in light of the pulmonary function studies. Dr. Tuteur stated that because the pulmonary function studies showed that the miner had an obstructive rather than a restrictive defect, his impairment was not due to pneumoconiosis. Director's Exhibit 65. Dr. Stewart invalidated the pulmonary function studies, while Dr. Dahhan interpreted them as showing only mild obstructive changes. Director's Exhibit 65.

Claimant next contends that the administrative law judge failed to consider that the opinions of Drs. Hansbarger and O'Connor are undocumented, or that employer included no positive x-ray readings with the materials submitted for Dr. Caffrey's review. Claimant's Brief at 15. We reject these contentions. Drs. Hansbarger and O'Connor listed the autopsy slides and reports submitted for their review and referred to this evidence in their reports. Director's Exhibits 42, 65. Dr. Caffrey also listed the materials that he reviewed. Director's Exhibit 44. Thus, the administrative law judge properly considered these opinions as documented. *See Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Co*., 6 BLR 1-1291 (1984).

Pursuant to Section 718.205, claimant challenges the administrative law judge's weighing of the evidence and his finding that the miner's death was not due to pneumoconiosis. Claimant's Brief at 21. The Fourth Circuit has held that in survivor's claims filed after January 1, 1982, death will be considered due to pneumoconiosis if claimant establishes that pneumoconiosis was a substantially contributing cause of death. Adopting the standard set forth in *Lukosevicz v. Director*, *OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989), the court stated that if pneumoconiosis hastens death in any way, it is a substantially contributing cause of death. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

In the instant case, the administrative law judge found that the miner was not disabled by pneumoconiosis and that his death was not caused by pneumoconiosis but failed to determine whether pneumoconiosis hastened the miner's death. Decision and Order at 24. Thus, we vacate the administrative law judge's finding at Section 718.205(c) and instruct him on remand to consider the evidence under the *Shuff* standard, if reached.[5] *See Shuff, supra*; *see also Grizzle, supra*; *Fineman v. Newport News Shipbuilding and Dry Dock Co*., 27 BRBS 104 (1993)("to hasten death is to cause it").

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH

Administrative Appeals Judge

_____NANCY S. DOLDER
Administrative Appeals Judge

_____REGINA C. McGRANERY
Administrative Appeals Judge