BRB Nos. 99-0958 BLA
and 99-0958 BLA-A

GLORIA LEE NOWLIN)
(Widow of MALCOLM NOWLIN))
)
Claimant-)
Respondent)
Cross-Petitioner) DATE ISSUED:
)
v.)
)
EASTERN ASSOCIATED COAL)
CORPORATION)
)
Employer-Petitioner)
Cross-Respondent)
)
DIRECTOR, OFFICE OF)
WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR) DECISION AND ORDER

Party-in-Interest

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

Robert F. Cohen (Cohen, Abate & Cohen, L.C.), Fairmont, West Virginia, for claimant.

Richard A. Dean (Arter & Hadden LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order on Remand - Awarding Benefits (83-BLA-0596) of Administrative Law Judge Clement J. Kichuk with respect to a miner's claim and a survivor'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). The relevant procedural history of this case is as follows: The miner filed an application for benefits on January 6, 1976, but died on March 17, 1981, before the hearing with respect to his claim could be conducted.[1] Director's Exhibits 1, 10. Claimant, the miner's spouse, filed a claim for survivor's benefits on April 14, 1981. Director's Exhibit 2. After the district director determined that claimant was entitled to benefits, the survivor's claim was consolidated with the miner's claim and the case was transferred to the Office of Administrative Law Judges for a formal hearing before Administrative Law Judge Richard S. Sippel.

In his Decision and Order, Judge Sippel accepted the parties' stipulation to six years of coal mine employment and considered the miner's claim under the regulations set forth in 20 C.F.R. Part 410, Subpart D. Judge Sippel determined that the existence of pneumoconiosis arising out of coal mine employment was established by the x-ray, biopsy, autopsy, and medical opinion evidence. Judge Sippel also found that although total disability due to pneumoconiosis was not established pursuant to 20 C.F.R. §410.426, the evidence was sufficient to prove total disability due to pneumoconiosis under 20 C.F.R. §718.204(b). Accordingly, Judge Sippel awarded benefits on both the miner's claim and the survivor's claim.

Employer appealed to the Board, which in a Decision and Order issued on June 26, 1990, affirmed Judge Sippel's finding that the biopsy and autopsy evidence was sufficient to establish the existence of pneumoconiosis. *Nowlin v. Eastern Associated Coal Corp.*, BRB No. 86-0624 BLA (June 26, 1990)(unpub.), slip op. at 3. The Board also affirmed, as unchallenged on appeal, Judge Sippel's finding that the miner's pneumoconiosis arose out of coal mine employment. *Id.* With respect to Judge Sippel's determination that pneumoconiosis was a contributing cause of the miner's total disability, however,

[1]Dr. Franyutti identified cardiorespiratory arrest due to or as a consequence of carcinoma of the larynx as the cause of the miner's death. Director's Exhibit 9.

the Board vacated this finding on the ground that Judge Sippel did not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *Id.* at 4. The Board also held that in light of Judge Sippel's determination that the existence of pneumoconiosis arising out of coal mine employment was established and in light of the decision of the United States Supreme Court in *Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988), the presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §410.490(b) was invoked as a matter of law. *Id.* The Board instructed Judge Sippel to address rebuttal of this presumption on remand. *Id.*

The case was reassigned to Administrative Law Judge Charles P. Rippey on remand due to Judge Sippel's unavailability. Judge Rippey found that employer failed to established rebuttal of the presumption under 20 C.F.R. §410.490(c). Accordingly, he reaffirmed the award of benefits in both claims. Employer appealed to the Board which, in a Decision and Order issued on August 17, 1993, held that Judge Rippey had jurisdiction to reconsider the miner's claim under Part 410, Subpart D and Section 410.490. *Nowlin v. Eastern Associated Coal Corp.*, BRB No. 91-2189 BLA (Aug. 17, 1993)(unpub.), slip op. at 3. The Board further determined, however, that employer's allegations of error regarding Judge Rippey's findings under Section 410.490(c) had merit. *Id.* The Board vacated these findings, therefore, and remanded the case for consideration of rebuttal under 20 C.F.R. §727.203(b) in accordance with the decision of the United States Supreme Court in *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 254, 15 BLR 2-155 (1991). *Id.*

Judge Rippey determined on remand that reconsideration of the miner's claim was beyond his jurisdiction, as he agreed with employer's contention that Judge Sippel denied the claim and claimant failed to challenge this denial on appeal. With respect to the survivor's claim, Judge Rippey determined that inasmuch as employer failed to establish rebuttal under Section 727.203(b), claimant was entitled to benefits. Both employer and claimant filed appeals with the Board. The Board held, in a Decision and Order issued on August 31, 1995, that the miner's claim was properly before Judge Rippey. *Nowlin v. Eastern Associated Coal Corp.*, BRB Nos. 94-2695 BLA and 94-2695 BLA-A (Aug. 31, 1995)(unpub.), slip op. at 4. The Board affirmed, as unchallenged on appeal, Judge Rippey's determination that rebuttal was not established under Section 727.203(b)(1), (b)(2), and (b)(4). *Id.* at 5. The Board further held, however, that inasmuch as Judge Rippey did not address all of the relevant medical opinions of record, his determination that employer did not establish rebuttal pursuant to Section 727.203(b)(3) could not be affirmed. *Id.* Accordingly, the Board

remanded the case to Judge Rippey for reconsideration of Section 727.203(b)(3) rebuttal and for reconsideration of his determination of the date of onset of total disability.

Judge Rippey awarded benefits with respect to both claims on remand, finding that the medical opinions of record were insufficient to establish rebuttal under Section 727.203(b)(3). Employer filed an appeal with the Board. In a Decision and Order issued on August 14, 1997, the Board affirmed Judge Rippey's determination that the medical opinions of Drs. Morgan and Laqueur were insufficient to establish rebuttal of the interim presumption. *Nowlin v. Eastern Associated Coal Corp.*, BRB No. 96-1405 BLA (Aug. 14, 1997)(unpub.), slip op. at 4. Concerning Judge Rippey's similar finding regarding Dr. Revercomb's opinion, however, the Board held that Judge Rippey did not address the doctor's statements before the West Virginia Occupational Pneumoconiosis Board (WVOPB) concerning the etiology of the miner's pulmonary impairment assuming that the miner had pneumoconiosis. *Id.* at 4-5. Thus, the Board remanded the case for reconsideration of Section 727.203(b)(3) rebuttal in light of Dr. Revercomb's opinion. The Board also instructed Judge Rippey to make a finding as to the date of onset of total disability. *Id.* at 5.

The case was reassigned to Administrative Law Judge Clement J. Kichuk on remand due to Judge Rippey's unavailability. Judge Kichuk (the administrative law judge) considered Dr. Revercomb's opinion in its entirety and concluded that it was insufficient to establish rebuttal under Section 727.203(b)(3). The administrative law judge determined, therefore, that employer failed to establish rebuttal of the interim presumption. Accordingly, he awarded benefits with respect to both the miner's claim and the survivor's claim and determined that benefits in the miner's claim are payable from May 1, 1976, the date on which the miner's right lung was removed due to the presence of carcinoma.

Employer asserts on appeal that the administrative law judge erred in finding that the evidence of record is insufficient to establish rebuttal pursuant to Section 727.203(b)(3). Employer also raises allegations of error regarding the determinations in the prior proceedings that the existence of pneumoconiosis has been proven and the administrative law judge's finding as to the date of onset of total disability. Finally, employer contends that the administrative law judge erred in awarding benefits in the survivor's claim. In her cross-appeal, claimant urges affirmance of the administrative law judge's Decision and Order with the exception of the finding regarding the date from which employer is liable for

benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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 applicable law. 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).

Turning first to the administrative law judge's consideration of the medical opinions under Section 727.203(b)(3), after reviewing the transcript of Dr. Revercomb's testimony before the WVOPB, the administrative law judge stated that:

> A careful reading of Dr. Revercomb's entire testimony permits me to conclude that the doctor was persuaded significantly by his finding that the miner did not suffer at all from occupational pneumoconiosis and, therefore, could not be disabled even in part by this disease.
>
> ...I am not persuaded by Dr. Revercomb's opinion and conclusions regarding causality of disability not due to occupational pneumoconiosis "even if one assumes" the presence of this disease. I find it is much more persuasive to accept and credit the finding that coal workers' pneumoconiosis is, indeed, present and its contribution, if any, to pulmonary disability must be determined. Dr. Revercomb tends to be conclusory in attributing disabling pulmonary abnormalities to the miner's pneumonectomy and history of pneumonia. I give less weight to Dr. Revercomb's opinions and conclusions. I give greater weight to Dr. Rasmussen's opinions and find his explanations of the abnormalities are much more persuasive to establish pulmonary disability and its causality.
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> Dr. Rasmussen examined the miner and also reviewed the medical evidence. His qualifications as a board-certified internist and as a pulmonary specialist add to the reliability of his objective findings, diagnoses, and opinions of disability due to pulmonary impairment.

Decision and Order at 7. Employer asserts that the administrative law judge's findings in this regard must be vacated, as the administrative law judge substituted his opinion for that of Dr. Revercomb when the administrative law judge essentially found, despite testimony to the contrary, that Dr. Revercomb did not truly accept the hypothetical premise that the miner had pneumoconiosis.

Employer also argues that the administrative law judge erred in characterizing Dr. Revercomb's opinion as "conclusory" and in according greater weight to Dr. Rasmussen's opinion.

Employer's allegations of error are without merit. In reviewing an administrative law judge's Decision and Order, the Board is charged with determining whether the administrative law judge's findings are rational and supported by substantial evidence. *See O'Keeffe*, *supra*. In making this determination, "substantial evidence" consists of evidence that is of sufficient quality and quantity as a reasonable mind might accept as adequate to support the finding at issue while that which is acceptable to a "reasonable mind," is a decision that rests within the "realm of rationality." *See Piney Mountain Coal Co. v. Mays,* 176 F.3d 753, 757, 21 BLR 2-587, 2-591 (4th Cir. 1999), citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(quoting *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197 (1938)). Thus, the mere fact that an administrative law judge could have reached a different conclusion regarding the weight to which a medical opinion is entitled does not justify vacating the administrative law judge's finding. *Id*.

In the present case, the administrative law judge's determination that Dr. Revercomb's opinion is insufficient to rule out pneumoconiosis as a contributing cause of the miner's disability pursuant to Section 727.203(b)(3) is rational and supported by substantial evidence. *See Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120 (4th Cir. 1984). The administrative law judge acted within his discretion in questioning the extent to which Dr. Revercomb actually relied upon the premise that the miner was suffering from pneumoconiosis as defined in 20 C.F.R. §§718.201 and 727.202. In the course of responding to a request that he assume that the miner had pneumoconiosis, Dr. Revercomb continued to refer to the fact that he did not think that the disease was present and stated that "[t]here is enough evidence to explain [the pulmonary disability] otherwise and I don't make the diagnosis of pneumoconiosis." Employer's Exhibit 7G at 10, 13. When an attorney sought Dr. Revercomb's acknowledgment that he was rendering his opinion regarding the cause of the miner's pulmonary disability based upon the assumption that pneumoconiosis was present, Dr. Revercomb primarily reiterated the basis for his conclusion that the evidence of record did not support a diagnosis of occupational pneumoconiosis. *Id*. at 13. In addition, although Dr. Revercomb attributed the miner's pulmonary disability to recurrent pneumonia, emphysema, fibrosis, and the pneumonectomy of the miner's right lung, he did not explicitly set forth the rationale for his apparent conclusion that coal dust exposure either did not or could not contribute to or aggravate these conditions. *Id*. Accordingly, the administrative law judge's finding that Dr. Revercomb's opinion is insufficient to

rule out pneumoconiosis as a contributing cause of the miner's pulmonary disability pursuant to Section 727.203(b)(3) is affirmed, as it is rational and supported by substantial evidence. *See Mays*, *supra*.

Moreover, the administrative law judge rationally determined that Dr. Rasmussen's opinion was entitled to greater weight than Dr. Revercomb's based upon Dr. Rasmussen's status as an examining physician who is Board-certified in Internal Medicine and Pulmonary Disease. Decision and Order at 7; Director's Exhibit 17; Claimant's Exhibit 9. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has observed that an expert's qualifications are important indicators of the reliability of his opinion. *See Milburn Colliery Company v. Hicks,* 138 F.3d 524, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The Fourth Circuit has also stated that "as a general matter, the opinions of treating and examining physicians deserve special consideration." *Grizzle v. Pickands Mather and Co.,* 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *accord Sterling Smokeless Coal Co. v. Akers,* 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Although Dr. Rasmussen acknowledged that the miner's pulmonary impairment was attributable to a number of possible factors, including the injuries the miner suffered in a car accident and the miner's use of cigarettes, he did not retract his opinion that pneumoconiosis was at least a contributing factor in causing the miner's total disability. Claimant's Exhibit 9 at 26-27, 44. In addition, as the administrative law judge noted, Dr. Rasmussen acknowledged that the pulmonary function study and smoking history that he obtained from the miner were not reliable, yet identified other evidence of record that supported his conclusion that pneumoconiosis played a role in the miner's disabling pulmonary impairment. Claimant's Exhibit 9 at 22, 24-25. Thus, the administrative law judge did not abuse his discretion in crediting Dr. Rasmussen's opinion and finding that the weight of the evidence, particularly Dr. Revercomb's opinion, did not support a finding of rebuttal under Section 727.203(b)(3). Decision and Order at 7; Director's Exhibit 41; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *see also Hicks*, *supra*,138 F.3d at 532, n.9, 21 BLR at 2-335, n.9, citing *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 19 BLR 2-23 (4th Cir. 1997). We affirm, therefore, the administrative law judge's finding that rebuttal was not established pursuant to Section 727.203(b)(3).

Employer also contends that the finding of pneumoconiosis made by Judge Sippel, and affirmed by the Board, must now be vacated, as Judge Sippel based his determination upon the "true doubt" rule which was subsequently invalidated by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries*

[Ondecko], 114 S.Ct. 2251, 18 BLR 2-2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP,* 990 F.2d 730, 17 BLR 2-61 (4th Cir. 1992). Based upon this assertion, employer maintains that administrative law judge should have considered rebuttal under Section 727.203(b)(4). Employer further contends that inasmuch as Judge Sippel denied benefits in the miner's claim and claimant did not appeal this denial, the subsequent proceedings with respect to the miner's application for benefits were void for lack of jurisdiction.

These contentions are without merit. As the Board indicated in its 1993 Decision and Order, Judge Sippel awarded benefits commencing on October 1, 1975, a date preceding the miner's death, and stated that claimant was entitled to additional benefits based upon her status as the miner's dependent. *Nowlin v. Eastern Associated Coal Corp.*, BRB No. 91-2189 BLA (Aug. 17, 1993)(unpub.), slip op. at 3. Thus, it is apparent that contrary to employer's allegation, Judge Sippel awarded benefits in the miner's claim. In addition, Judge Sippel determined in his Decision and Order awarding benefits that the preponderance of the biopsy and autopsy evidence supported a finding that the miner had pneumoconiosis. 1986 Decision and Order at 10-11. Judge Sippel indicated, in the alternative, that the existence of the disease was also demonstrated based upon the "true doubt" rule. 1986 Decision and Order at 11. The Board affirmed Judge Sippel's determination that the opinion in which Dr. Franyutti diagnosed pneumoconiosis outweighed the contrary opinions of record and did not address Judge Sippel's application of the "true doubt" rule. *Nowlin v. Eastern Associated Coal Corp.*, BRB No. 86-0624 BLA (June 26, 1990)(unpub.), slip op. at 3. Inasmuch as there was no error in the Board's prior holding, we decline to alter the prior disposition of this issue. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *see also Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting). Accordingly, rebuttal under Section 727.203(b)(4) is precluded in this case. *See Curry v. Beatrice Pocahontas Coal Co.*, 18 BLR 1-59 (1994), *rev'd on other grounds*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995).

Inasmuch as we have affirmed the administrative law judge's finding that rebuttal was not established under Section 727.203(b)(3) - the only rebuttal provision available to employer at this juncture in the proceedings - we also affirm the award of benefits with respect to the miner's claim. In addition, based upon the finding of entitlement regarding the miner's application for benefits, the administrative law judge properly determined that claimant's is entitled to benefits with respect to the survivor's claim.[2] 30 U.S.C. §932(l); *see Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 12 BLR 2-60 (3d Cir. 1988).

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[2]In light of our affirmance of the administrative law judge's finding that claimant is entitled to benefits based upon the award of benefits in the survivor's

The final issue presented in this case concerns claimant allegation in her cross-appeal that the administrative law judge erred in designating May 1, 1976, as the date from which benefits are payable regarding the miner's claim. The administrative law judge stated that "[t]he exact date of onset is not readily ascertainable from the medical evidence of record." Decision and Order at 10. The administrative law judge then referred to the March 28, 1980 medical report in which Dr. Rasmussen concluded that the miner was totally disabled due, at least in part, to pneumoconiosis and the opinion in which Dr. Morgan, a physician who participated in the removal of the miner's right lung, indicated that because pneumoconiosis was likely to be present in the miner's remaining lung, the miner should not be exposed to coal dust. Director's Exhibits 14, 17; Claimant's Exhibit 1. The administrative law judge determined that "sufficient evidence demonstrates that the miner's total disability due, in part, to pneumoconiosis began upon removal of his right lung by Drs. Walker and Morgan on May 8, 1976." Decision and Order at 11.

Claimant is correct in asserting that the administrative law judge's designation of May 1, 1976, as the date of onset of total disability was not proper, as Dr. Morgan's comments regarding the need for the miner to avoid the inhalation of coal dust do not support a finding of total disability due to pneumoconiosis. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *see also DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988). Moreover, although Dr. Rasmussen indicated that the miner's pulmonary impairment was too severe to be attributed to his pneumonectomy alone, Dr. Rasmussen did not state that the miner became disabled at any particular point in time prior to the pneumonectomy. Director's Exhibit 17. Thus, the administrative law judge's finding regarding the date on which the miner's entitlement to benefits commenced cannot be affirmed. 20 C.F.R. §§725.503(b), 727.302; *see Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *see generally Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). In light of the administrative law judge's rational conclusion that "[t]he exact date of onset is not readily ascertainable from the medical

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claim, we need not address employer's allegations concerning claimant's entitlement to benefits under 20 C.F.R. Part 718.

evidence of record," however, we hold, as a matter of law, that the date of onset in the present case is January 1, 1976, the first day of the month in which miner's claim was filed. *Id.*; Decision and Order at 11.

Accordingly, the administrative law judge's Decision and Order awarding benefits in the survivor's claim is affirmed. With respect to the miner's claim, the

administrative law judge's award of benefits is affirmed, but his finding with respect to the date of onset is vacated and benefits are awarded effective January 1, 1976.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge