BRB No. 01-0680 BLA

BETTY VAUGHN (Executrix of the Estate of MARGARET TAYLOR, widow of HILLARD TAYLOR)	)	
Claimant-Petitioner	)	
v.	)	
ALABAMA BY-PRODUCTS CORPORATION	)	DATE ISSUED:
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

Richard J. Ebbinghouse, (Gordon, Silberman, Wiggins & Childs, P.C.), Birmingham, Alabama, for claimant.

Laura A. Woodruff (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Helen H. Cox (Eugene Scalia, 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Second Remand-Denying Benefits (83-BLA-1909) 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).[2] This case encompasses both a miner's and a survivor's claim for benefits, and is before the Board for the fifth time. The miner filed an application for benefits on November 23, 1979. Director's Exhibit 1. The district director made an initial finding of entitlement which employer contested. The miner began receiving interim benefits from the Black Lung Disability Trust Fund. The miner died on January 26, 1984, before the claim was transferred to the Office of Administrative Law Judges for a hearing. Claimant, the miner's widow, filed an application for survivor's benefits on March 3, 1984. Director's Exhibit W1. After an initial finding of entitlement was made with respect to the survivor's claim, at employer's request, both claims were transferred to the Office of Administrative Law Judges for a hearing before Administrative Law Judge Ronald T. Olson. Judge Olson accepted the parties' stipulation to twenty-four years of coal mine employment and considered entitlement on both claims pursuant to the regulations set forth at 20 C.F.R. Part 727. Judge Olson found that the evidence sufficient to establish invocation of the

[1] The claimant in this case, Margaret Taylor, is the widow of the miner Hillard Taylor, who died on January 26, 1984. The miner's cause of death was listed as cardiopulmonary arrest due to severe congestive heart failure and severe renal and hepatic failure. Director's Exhibit W3. Mrs. Taylor subsequently died. Her interest in this case is being represented by Mrs. Betty Vaughn as the executrix of her estate.

[2] 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). The regulations at 20 C.F.R. §727.203, were not affected by these amendments. *See* 20 C.F.R. §§725.2, 725.4(a), (d), (e).

interim presumption of death due to coal workers' pneumoconiosis at 20 C.F.R. §727.203(a)(2), but further determined that the presumption was rebutted at 20 C.F.R. §727.203(b)(3) and (4). Benefits were, accordingly, denied on both claims under Part 727 and 20 C.F.R. Part 410, Subpart D.

Pursuant to claimant's appeal, the Board held, as a matter of law, that the evidence was insufficient to establish rebuttal of the interim presumption, and remanded the case to the district director for payment of benefits. *Taylor v. Alabama By-Products Corp.*, BRB No. 86-1088 BLA (Mar. 17, 1988)(unpub.). Employer appealed the Board's Decision and Order to the United States Court of Appeals for the Eleventh Circuit. The court determined that the Board erred in holding that none of the medical opinions of record satisfied the Section 727.203(b)(3) rebuttal standard set forth in *Black Diamond Coal Co. v. Benefits Review Board [Raines]*, 758 F.2d 1532, 7 BLR 2-209 (11th Cir. 1985). In particular, the court stated that the Board did not properly assess the opinions of Dr. Jones, Director's Exhibits 29, 30; Employer's Exhibit 6, who attributed the miner's pulmonary disability to cigarette smoking, but could not state with certainty that coal dust exposure did not contribute minimally to the miner's impairment. The court also indicated that Judge Osborn's finding of (b)(4) rebuttal was not rational. The court, therefore, vacated the Board's Decision and Order and remanded the case to the Board. *Taylor v. Alabama By-Products Corp.*, 862 F.2d 1529, 12 BLR 2-110 (11th Cir. 1989). Based on the Eleventh Circuit's holdings, the Board reinstated and affirmed Judge Osborn's determination that the presumption was rebutted under subsection (b)(3), and remanded the case to Judge Osborn for reconsideration of rebuttal pursuant to subsection (b)(4) and for consideration of entitlement pursuant to 20 C.F.R. §410.490. *Taylor v. Alabama By-Products Corp.*, BRB No. 86-1088 BLA (Apr. 21, 1989)(unpub. Order). Due to Judge Osborn's unavailability, the case was reassigned to Administrative Law Judge Robert L. Cox on remand.

Judge Cox found that the evidence was insufficient to establish rebuttal under subsection (b)(4). Judge Cox further found that entitlement was established pursuant to Section 410.490. Accordingly, he awarded benefits on both claims. Employer filed an appeal with the Board in which it contested Judge Cox's findings pursuant to subsection (b)(4) and Section 410.490. The Board held that in light of the recent decision of the United States Supreme Court in *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 15 BLR 2-155 (1991), consideration of entitlement under Section 410.490 was precluded, but also held that, in light of its prior affirmance of Judge Osborn's finding of rebuttal under (b)(3), entitlement was precluded with respect to both claims under Part 727 and Part 718. The Board, therefore, reversed Judge Cox's Decision and Order awarding benefits on both claims without reaching the issue of (b)(4) rebuttal. *Taylor v. Alabama By-Products Corp.*, BRB No. 90-1272 BLA (Oct. 14, 1992)(unpub.).

Claimant appealed to the Eleventh Circuit. The court held that the Board erred in

relying upon dicta in the court's prior decision to hold that Dr. Jones's opinion supported a finding of rebuttal under subsection (b)(3), and remanded the case to the Board for reconsideration of Judge Osborn's findings in light of the allegations of error that claimant raised in her first appeal to the Board. *Taylor v. Alabama By-Products Corp.*, 16 F.3d 1493 (11th Cir. 1994). On remand, the Board affirmed Judge Osborn's decision to credit Dr. Jones's opinion as reasoned based upon his qualifications and the documentation supporting his diagnoses. The Board further held, however, that Judge Osborn did not properly weigh the contrary opinions of Drs. Tai, Goodman, Felgner, and Grimes, Director's Exhibits 14, 15. Accordingly, the Board remanded the case for reconsideration. *Taylor v. Alabama By-Products Corp.*, BRB No. 90-1272 BLA (Apr. 19, 1995)(unpub. Order).

On remand, the case was assigned to Administrative Law Judge Clement J. Kichuk (the administrative law judge). The administrative law judge, finding that Dr. Jones's opinion was entitled to the most weight, concluded that rebuttal of the presumption was demonstrated at subsection (b)(3) and that entitlement was, therefore, precluded under Part 718. Accordingly, benefits were denied with respect to both claims.

Claimant filed an appeal with the Board which, in a Decision and Order issued on November 12, 1998, affirmed the administrative law judge's finding that employer rebutted the presumption at subsection (b)(3) and affirmed the denial of benefits with respect to the miner's claim under Part 727 and Part 718. The Board held, however, that the administrative law judge should have explicitly considered whether the presumption of death due to pneumoconiosis provided at Section 727.203(a) was rebutted. The Board, therefore, remanded the case to the administrative law judge to reconsider this issue. *Taylor v. Alabama By-Products Corp.*, BRB No. 98-0268 BLA (Nov. 11, 1998)(unpub.). On remand, the administrative law judge granted employer's Motion to Strike material attached to claimant's Brief on Remand and found that the employer established rebuttal of the presumption of death due to pneumoconiosis under subsection (b)(3). The administrative law judge also determined that the evidence of record was insufficient to establish entitlement to survivor's benefits under Part 718.

Claimant again appealed to the Board which, in a Decision and Order issued on August 2, 2000, affirmed in part, and vacated in part, the administrative law judge's Decision and Order on Remand and again remanded the claim for further consideration. *Taylor v. Alabama By-Products Corp.*, BRB No. 99-1065 BLA (Aug 2, 2000)(unpub.). Specifically, the Board held that the administrative law judge had properly applied Part 727 to the survivor's claim and further held, as a matter of law, that Dr. Jones's medical opinion was insufficient to rebut the presumption of death due to pneumoconiosis provided at subsection (b)(3). Thus, the Board vacated the administrative law judge's finding of (b)(3) rebuttal and remanded the case for reconsideration of the issue and, if necessary, consideration of (b)(4) rebuttal. The Board also held that the administrative law judge was not required to treat Dr.

Branscomb's opinion as hostile to the Act pursuant to subsection (b)(3). The Board, however, accepted claimant's assertion and held that the administrative law judge erred in concluding that Dr. Felgner's silence on the issue of causation supported a finding of rebuttal at subsection (b)(3). The Board further concluded that Dr. Jones's opinion was relevant to the issue of (b)(4) rebuttal. Lastly, the Board affirmed employer's Motion to Strike material appended to Claimant's Brief on Remand.

On remand, the administrative law judge, in the Decision and Order currently before us on appeal, found that employer established rebuttal of the presumption of death due to pneumoconiosis pursuant to subsections (b)(3) and (4). Decision and Order on Second Remand at 4-12. The administrative law judge further found that the evidence of record was insufficient to establish entitlement to survivor's benefits pursuant to Part 718. Accordingly, benefits were denied on both the miner's and the survivor's claims.

On appeal, claimant argues that the medical opinions of record cannot support a finding of rebuttal under subsections (b)(3) and (4) and, therefore, seeks reversal of the administrative law judge's Decision and Order denying benefits. In response, employer urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), in response, seeks reversal of the administrative law judge's Decision and Order denying benefits and that an award of benefits be entered under Part 727 because employer has failed to rebut the presumption at subsections (b)(3) and (4).

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).

Claimant asserts that the administrative law judge erred in finding that the medical opinions of Dr. Branscomb and Dr. Felgner support a finding of rebuttal at subsection (b)(3). Employer's Exhibit 4; Director's Exhibit 14. Specifically, claimant asserts that Dr. Branscomb's opinion cannot support a finding of (b)(3) rebuttal because Dr. Branscomb failed to address the effect of the miner's coal dust exposure on his chronic obstructive pulmonary disease or death, and because Dr. Branscomb's statement that the miner's disabling respiratory impairment was "probably not," related to coal mine employment, Employer's Exhibit 4, was qualified. Claimant's Brief at 19-20, 22. Further, while claimant concedes that Dr. Branscomb provided a "no" answer to the question of whether claimant's cause of death arose out of or was significantly related to coal mine employment, claimant contends that Dr. Branscomb's statement, that only positive x-ray evidence is indicative of a coal mine related disease, *i.e.*, clinical pneumoconiosis, renders the opinion incredible as a

matter of law because it fails to address the possibility of legal pneumoconiosis, *i.e.*, a pulmonary disease arising out of coal mine employment. Claimant's Brief at 23-25; Employer's Exhibit 4. Lastly, claimant argues that Dr. Felgner's opinion is not supportive of a finding of (b)(3) rebuttal because Dr. Felgner's silence on the issue of whether pneumoconiosis or coal dust exposure played a role in the miner's death precludes that opinion from being used to support a finding of subsection (b)(3) rebuttal.

In finding that claimant established rebuttal pursuant to subsection (b)(3), the administrative law judge concluded that the medical opinion of Dr. Branscomb, that the miner's death was not due to pneumoconiosis, was entitled to great weight as it constituted a well-reasoned medical opinion. Decision and Order on Second Remand at 6; Employer's Exhibit 4. The administrative law judge also acknowledged Dr. Branscomb's superior qualifications in pulmonary disease. Decision and Order on Second Remand at 6. Finally, the administrative law judge found that the opinion of Dr. Felgner supported a finding of (b)(3) rebuttal because Dr. Felgner's failure, as the miner's treating physician, to specifically indicate that pneumoconiosis played a role in the miner's death, was sufficient to suggest a contrary conclusion, *i.e.*, that pneumoconiosis played no role in the miner's death. Decision and Order at 6-7.

In order to establish rebuttal of the interim presumption pursuant to subsection (b)(3), employer must affirmatively rule out, through credible, medical evidence, coal mine employment and/or coal mine employment related disease as the source of the miner's disability or death. *See Alabama By-Products v. Killingsworth*, 733 F. 2d 1511, 6 BLR 2-59 (11th Cir. 1984); *see also Raines*, *supra*. In this case, Dr. Branscomb provided a simple "no" to the question "[d]id the claimant's cause of death arise out of or was it significantly related to coal mine employment." Employer's Exhibit 4. Dr. Branscomb, however, provided no support for this conclusion. In order to constitute credible medical evidence sufficient to establish rebuttal pursuant to subsection (b)(3), a medical opinion must be well-reasoned and well-documented. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). While the determination of whether a medical opinion is sufficiently reasoned or documented is within the purview of the administrative law judge, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), an opinion which fails to explain the bases for its conclusions and fails to explain how data supports a diagnosis cannot as matter of law support employer's burden of affirmatively establishing rebuttal. *See Clark*, *supra*; *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985). Further, Dr. Branscomb specifically opined that, given the facts of this case, "the only way to determine whether pneumoconiosis was present...is for me to look at the reports of those persons reading the x-rays." Employer's Exhibit 4. Thus, Dr. Branscomb's opinion clearly fails to take into account the possibility of the presence of legal pneumoconiosis, *i.e.*, a chronic dust disease

arising out of coal mine employment, not necessarily demonstrated by x-ray evidence. 20 C.F.R. §727.202. Further, as discussed, *supra*, employer's burden of rebuttal at subsection (b)(3) requires it to affirmatively rule out the presence of a coal mine employment related disease as the cause of death. Thus, the failure of a physician to address whether coal mine related disease caused the miner's death renders his opinion insufficient, as a matter of law, to support a finding of rebuttal at subsection (b)(3). *See Killingsworth, supra*. Further, Dr. Branscomb's statement, that the miner "probably [did] not" suffer from pneumoconiosis is an equivocal statement and considered together with his incorrect reliance on negative x-rays cannot affirmatively rule out the presence of a coal dust related disease as the cause of death, which is required to rebut the presumption at subsection (b)(3). *See Killingsworth*, *supra*; *see also Raines*, *supra*. For these reasons we concluded that Dr. Branscomb's opinion is not supportive of a finding of rebuttal at subsection (b)(3) as a matter of law.

Claimant next contends that the administrative law judge also erred in finding that Dr. Felgner's opinions supported a finding of (b)(3) rebuttal. Dr. Felgner, the miner's treating physician, found that the miner suffered from chronic obstructive pulmonary disease (COPD) related, in part, to coal dust exposure in a May 1982 report, but did not subsequently mention COPD or pneumoconiosis on the miner's death certificate or in his summary of the miner's final hospitalization. The miner died of cardiopulmonary arrest on January 26, 1984. Director's Exhibits W3, 14; Employer's Exhibit 5. The administrative law judge found that Dr. Felgner's later silence as to whether the miner's coal-mine related disease caused the miner's death constituted evidence that pneumoconiosis did not contribute to the miner's death.

Under the standard established in *Raines* and *Killingsworth*, the party opposing entitlement must affirmatively prove that pneumoconiosis played no role in the miner's death. Accordingly, Dr. Felgner's silence on that question does not support a finding of subsection (b)(3) rebuttal. *See Killingsworth*, *supra*; *see also Raines*, *supra*. Thus, because the record does not contain credible medical evidence affirmatively ruling out the presence of coal dust exposure and/or pneumoconiosis as contributing factors in the miner's death, we hold that employer is precluded from establishing rebuttal pursuant to subsection (b)(3) and we reverse the administrative law judge's finding that employer established rebuttal at this subsection.

Claimant next asserts that the administrative law judge erred in finding that employer established rebuttal of the presumption pursuant to subsection (b)(4) by showing that the miner did not have pneumoconiosis inasmuch as the opinions of Dr. Felgner, claimant's treating physician, Dr. Goodman, Dr. Tai and Dr. Grimes all established the presence of pneumoconiosis. Director's Exhibits 14, 15, 26, 29, W3. Claimant asserts that the administrative law judge erroneously accorded greatest weight to the opinions of Dr. Jones inasmuch as Dr. Jones failed to consider the miner's lengthy coal mine employment history

and how such a history contributed to the miner's pulmonary condition in concluding that the miner did not have pneumoconiosis. Lastly, claimant asserts that because the opinion of Dr. Branscomb is equivocal as to the existence of pneumoconiosis, the administrative law judge erred in finding that it supported a finding of (b)(4) rebuttal.[3]

In finding that employer established rebuttal pursuant to subsection (b)(4), the administrative law judge concluded that the weight of the evidence of record affirmatively established the absence of pneumoconiosis. Decision and Order on Second Remand at 7-13. In reaching this determination, the administrative law judge initially found that the weight of the x-ray evidence was overwhelmingly negative for the existence of "clinical" pneumoconiosis. Decision and Order on Second Remand at 7-8. Considering the medical opinion evidence, the administrative law judge accorded greatest weight to the opinions of Dr. Jones because of his superior qualifications and because he rendered a well-reasoned medical opinion. Decision and Order on Second Remand at 12. The administrative law judge explained his determination that the opinions of Drs. Goodman, Tai, Grimes and Felgner, all of whom concluded that the miner suffered from pneumoconiosis, were entitled to less weight: Dr. Goodman failed to explain how pneumoconiosis contributed to the miner's totally disabling respiratory or pulmonary condition; Dr. Tai understated the miner's substantial smoking history; Dr. Grimes did not identify the source of the miner's COPD; and Dr. Felgner, the miner's treating physician, failed to disclose how he reached the medical conclusion that the miner's disabling lung impairment arose from coal mine dust exposure, rather than smoking. Decision and Order on Second Remand at 8-10, 12-13.

[3] We reject, out of hand, claimant's assertion that the administrative law judge erroneously relied upon Dr. Branscomb's opinion as support for a finding of rebuttal at 20 C.F.R. §727.203(b)(4). A review of the administrative law judge's decision demonstrates that he made no such determination. Decision and Order on Second Remand at 7-13.

In order to establish rebuttal of the interim presumption pursuant to subsection (b)(4), the party opposing entitlement must affirmatively establish that the miner does not or did not suffer from clinical and legal pneumoconiosis. *See Raines*, *supra*; *see generally Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985). In this case, the administrative law judge based his finding that Dr. Jones's opinion was supportive of (b)(4) rebuttal entirely upon the statement of Dr. Jones, that he "did not feel that [the miner] had coal workers' pneumoconiosis." Decision and Order on Second Remand at 13; Employer's Exhibit 6. Review of Dr. Jones's medical opinions, however, show that the physician also indicated that it "could not be stated with certainty" that the miner's coal mine employment did not contribute "minimally" to his pulmonary disability, Employer's Exhibit 30. Thus, these two statements are, at face value, inconsistent, since one statement clearly rules out the existence of pneumoconiosis while the other suggests that legal pneumoconiosis might be present. Thus, insofar as Dr. Jones's medical opinions constitute the only medical evidence which could be supportive of a finding of (b)(4) rebuttal, and because the burden rests with employer to affirmatively rule out the existence of pneumoconiosis, *see Raines*, remand is necessary for the administrative law judge to address specifically the inconsistent diagnoses rendered by Dr. Jones. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Further, as claimant contends, a review of Dr. Jones's opinions indicates that the physician failed to address fully the effect of the miner's long-term coal dust exposure on the miner's disabling respiratory impairment. Thus, the administrative law judge's failure to address factors which could potentially undermine the credibility of a physician's opinion requires remand for clarification. *See generally Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). Additionally, while an administrative law judge may, within his discretion, accord greatest weight to the opinions of a physician he determines to have superior credentials, *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Corp.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), the administrative law judge's findings regarding Dr. Jones's opinion cannot stand as presently constituted. Accordingly, the administrative law judge's finding of (b)(4) rebuttal is vacated and the case is remanded for further consideration of Dr. Jones's opinions in order to determine whether the opinions

affirmatively rule out the presence of pneumoconiosis, both legal and clinical.[4]

We further address other allegations of error at subsection (b)(4) as they may affect the disposition of the case on remand. We reject claimant's assertion that the administrative law judge erred in according less weight to the opinions of Drs. Tai and Goodman based on their understatement of the miner's coal mine employment history. Contrary to claimant's assertion, an administrative law judge may accord less weight to medical opinions which rely on an erroneous length of coal mine employment history as such opinions fail to present a complete picture of the miner's health. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984); *see also Stark v. Director, OWCP*, 9 BLR 1-361 (1986). Further, contrary to claimant's assertion, the administrative law judge could properly conclude that Dr. Grimes's silence on the issue of legal pneumoconiosis rendered his opinion irrelevant on causation. *See generally Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Lastly, we reject any assertion by claimant that the administrative law judge is duty-bound to accord greatest weight to the opinion of a treating physician. The determination of whether to accord greater weight to the opinion of a treating physician is a determination soundly within the administrative law judge's discretion. *See Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *see Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). The status of a physician is only one factor to be considered by an administrative law judge in deciding how much weight to accord a medical opinion. *See Tedesco, supra*. In the instant case, the

[4] In reaching our decision to remand this case for further consideration at Section 727.203(b)(4), we decline the invitation of claimant and the Director to simply reverse the administrative law judge's finding of rebuttal at subsection (b)(4). We do not hold, as was the case with Dr. Branham's opinion, that Dr. Jones's opinions cannot support a finding of rebuttal at subsection (b)(4); only that the administrative law judge's finding, as such, is not supportive of the finding of rebuttal. Reversing the holding of the administrative law judge would be tantamount, here, to engaging in fact-finding and weighing of the evidence which is outside our scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

administrative law judge took into account Dr. Felgner's status as a treating physician, but permissibly concluded that the opinion was not entitled to determinative weight. *See Tedesco*, *supra*.

In summary, the administrative law judge's finding of (b)(3) rebuttal is reversed, the administrative law judge's finding of (b)(4) rebuttal is vacated, and the case is remanded for further consideration thereunder. If, on remand, the administrative law judge determines that the evidence does not establish rebuttal pursuant to (b)(4), then claimant has established entitlement to benefits.[5]

[5] A finding of rebuttal at subsection (b)(4) precludes an award of survivor's benefits under Part 718. *See generally Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

Accordingly, the administrative law judge's Decision and Order on Second Remand-Denying Benefits is reversed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge