BRB No. 97-0726 BLA

CHARLES G. GRIGG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand - Denying Benefits of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Ray E. Ratliff, Jr., Charleston, West Virginia, for claimant.

Catherine Celeste Helm (Marvin Krislov, Deputy Solicitor for National Operations; 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, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Second Remand - Denying Benefits (83-BLA-7684) of Administrative Law Judge John C. Holmes 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). This case is before the Board for the fourth time. Initially, claimant filed an application for benefits with the Social Security Administration on December 1, 1972. Director's Exhibit 43. This claim was denied by the Social Security Administration on September 9, 1975. *Id*. Claimant filed a claim for benefits with the Department of Labor on July 25, 1975. Director's Exhibit 1. On December 10, 1985, Administrative Law Judge George P. Morin (Judge Morin) issued a Decision and Order - Denying Benefits. Judge Morin credited claimant with twenty-two years of coal mine employment. Further, after noting that the Director, Office of Workers' Compensation Programs (the Director), conceded the presence of pneumoconiosis, Judge Morin found that the x-ray evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Judge Morin further found that the

evidence was sufficient to establish rebuttal of the interim presumption under 20 C.F.R. §727.203(b)(2). Judge Morin also found that the evidence was insufficient to establish entitlement pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied. Claimant appealed, and the Board issued an Order remanding the case to the Office of Administrative Law Judges to hold a new hearing in view of the fact that the hearing transcript was missing from the record or, in the alternative, to produce a copy of the transcript of the previous hearing. *Grigg v. Director, OWCP*, BRB No. 85-2975 BLA (July 27, 1989)(unpub. Order).

On remand, Administrative Law Judge John C. Holmes (the administrative law judge), in a Decision and Order issued on April 25, 1990, indicated that claimant had ten years of coal mine employment, and found that the evidence was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1)-(4). Further, the administrative law judge found that the evidence was sufficient to establish rebuttal of the interim presumption under Section 727.203(b)(2)-(3). The administrative law judge also found that even if 20 C.F.R. §410.490 were applicable, the evidence was insufficient to establish entitlement under Section 410.490. The administrative law judge also determined that the evidence was insufficient to establish entitlement pursuant to Part 410, Subpart D. Accordingly, benefits were denied.

Claimant appealed, and the Board affirmed the administrative law judge's finding of ten years of coal mine employment as unchallenged on appeal. In addition, the Board affirmed the administrative law judge's finding that the evidence was sufficient to establish rebuttal pursuant to Section 727.203(b)(3), and declined to address the administrative law judge's findings at Section 727.203(b)(2) and 727.203(a)(1)-(4). The Board also held that the claim was not subject to adjudication under Section 410.490 and that claimant was precluded from establishing entitlement under Part 410, Subpart D. Accordingly, the Board affirmed the administrative law judge's Decision and Order denying benefits. *Grigg v. Director, OWCP*, BRB No. 90-1578 BLA (Mar. 24, 1992)(unpub.). Claimant filed a motion for reconsideration, which the Board denied summarily. *Grigg v. Director, OWCP*, BRB No. 90-1578 BLA (Sept. 24, 1992)(unpub. Order on Reconsideration).

Claimant appealed to the United States Court of Appeals for the Fourth Circuit. The court held that a medical opinion stating, without equivocation, that the miner suffers from no respiratory or pulmonary impairment of any kind is sufficient to rule out any connection between coal mine employment and total disability, at least if the interim presumption was invoked pursuant to Section 727.203(a)(1). On the other hand, the court held that opinions that merely state that the miner's impairment is not disabling in and of itself, and that question the miner's whole-man disability, are insufficient to establish rebuttal at Section 727.203(b)(3). In vacating the administrative law judge's finding that the evidence was sufficient to establish Section 727.203(b)(3) rebuttal, the court stated that the findings of Drs. Zaldivar and Daniel, that claimant was not disabled "from a pulmonary standpoint," have no probative value at Section 727.203(b)(3) or (b)(2) rebuttal. The court concluded by holding that the administrative law judge erred in ignoring the opinion of claimant's treating physician, Dr. Wurst, with respect to Section 727.203(b)(3). The court also stated that the

administrative law judge erred in not accepting the Director's stipulation that claimant suffers from pneumoconiosis at Section 727.203(a)(1). Further, the court stated that the Director had also conceded that the evidence was insufficient to establish rebuttal pursuant to Section 727.203(b)(2). Accordingly, the court vacated the Board's decision and remanded the case for reconsideration. *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). The Board subsequently remanded the case to the Office of Administrative Law Judges for reconsideration consistent with the opinion of the Fourth Circuit. *Grigg v. Director, OWCP*, BRB No. 90-1578 BLA (Aug. 9, 1994)(unpub. Order).

On remand, the administrative law judge stated that he accepted the stipulations of the parties as to invocation of the interim presumption under Section 727.203(a)(1), but found, as a "factual matter," that claimant did not have pneumoconiosis. 1994 Decision and Order at 1. In concluding that the evidence was sufficient to establish rebuttal pursuant to Section 727.203(b)(3), the administrative law judge credited the opinions of Drs. Zaldivar, Salon and Daniel as "experts," finding that their opinions outweighed the contrary opinions of Drs. Wurst, Rasmussen and Gajendragadkar. 1994 Decision and Order at 2. Accordingly, benefits were denied.

Claimant appealed, and the Board vacated the administrative law judge's finding that the evidence was sufficient to establish rebuttal pursuant to Section 727.203(b)(3), and remanded the case to the administrative law judge for further proceedings. Specifically, the Board, citing the Fourth Circuit's decision in *Grigg*, held that the administrative law judge erred in crediting Dr. Zaldivar's opinion because it was based upon the erroneous premise that claimant did not suffer from pneumoconiosis. Further, the Board held that the administrative law judge erred in not providing a sufficient basis for discrediting Dr. Rasmussen's report. The Board also held that the administrative law judge erred in discrediting Dr. Gajendragadkar's opinion as insufficiently documented, and held that the administrative law judge erred in discrediting the opinion of Dr. Wurst. Finally, the Board held that to the extent the Fourth Circuit indicated that the parties' stipulation that claimant suffered from pneumoconiosis was binding upon the administrative law judge, the administrative law judge erred in disregarding the Director's concession and in reviewing the medical evidence from the perspective that the miner does not suffer from pneumoconiosis. *Grigg v. Director, OWCP*, BRB No. 95-0828 BLA (Oct. 30, 1995)(unpub.).

On remand, the administrative law judge, in a Decision and Order issued on January 29, 1997, found that rebuttal of the interim presumption was established under Section 727.203(b)(3) based on Dr. Daniel's 1985 opinion, which he found ruled out the causal relationship between the miner's total disability and his coal mine employment, and was the best reasoned and documented. Further, the administrative law judge found that entitlement was not established pursuant to Part 410, Subpart D, and Part 718. Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in finding that the evidence was sufficient to establish rebuttal under Section 727.203(b)(3). The Director has filed a Motion to Remand, arguing that although he agrees with the administrative law judge's assessment of Dr. Daniel's report, the

administrative law judge erred in not providing a rationale for rejecting the opinions of Drs. Rasmussen, Gajendragadkar, and Wurst.

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 the 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).

Initially, claimant raises a number of allegations with regard to the administrative law judge's weighing of the medical evidence under Section 727.203(b)(3). Claimant argues that the administrative law judge did not explain why he credited the opinion of Dr. Daniel. In addition, the Director argues that the administrative law judge erred by failing to provide a rationale for rejecting the opinions of Drs. Rasmussen, Gajendragadkar, and Wurst. The administrative law judge, in his most recent Decision and Order, described the opinions of Drs. Rasmussen, Gajendragadkar, and Wurst. 1997 Decision and Order at 3-5. The administrative law judge then credited Dr. Daniel's most recent opinion, finding that claimant was not disabled from a pulmonary standpoint, because he found it to be "by far, the best reasoned and documented, and is most consistent with the credible, objective medical evidence, including, the preponderance of the positive x-ray evidence and the overwhelming preponderance of the normal physical findings on examination, pulmonary function studies, and arterial blood gas studies." 1997 Decision and Order at 6. Thus, the administrative law judge adequately set forth his findings with respect to Dr. Daniel's opinion. *Id*.; *see generally Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Moreover, the administrative law judge implicitly found the opinions of Drs. Rasmussen, Gajendragadkar, and Wurst to be less reasoned and documented than Dr. Daniel's opinion. 1997 Decision and Order at 6. We, therefore, reject the contention that the administrative law judge erred in failing to provide a rationale for discrediting the opinions of Drs. Rasmussen, Gajendragadkar, and Wurst.

Claimant further argues that the administrative law judge erred in crediting Dr. Daniel's opinion because it is not well documented. Dr. Daniel's 1985 report includes a history, subjective complaints, physical examination, x-ray, pulmonary function study, blood gas study, electrocardiogram, and laboratory tests. Director's Exhibit 45; *see* 1997 Decision and Order at 5. Contrary to claimant's contention, the administrative law judge acted within his discretion in finding Dr. Daniel's opinion documented. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see generally Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

Furthermore, claimant argues that Dr. Zaldivar's opinion is incomplete, and entitled to less weight since the miner was unable to complete the exercise blood gas testing. The administrative law judge, in his most recent Decision and Order, stated, "pursuant to the instructions of the Board and Court, I have discounted the opinion of Dr. Zaldivar." 1997 Decision and Order at 6. Thus, contrary to claimant's suggestion, the administrative law judge did not credit Dr. Zaldivar's opinion on remand.

Next, claimant argues that the administrative law judge erred by never addressing the "significance" of the "exercise value" performed by Dr. Rasmussen in giving Dr. Rasmussen's report less weight than the opinion of Dr. Daniel. Contrary to claimant's suggestion, the administrative law judge noted Dr. Rasmussen's discussion of the resting blood gas studies and did not abuse his discretion as fact-finder in finding that Dr. Daniel's contrary conclusion was more consistent with the objective testing of record and was therefore entitled to greater weight.[1] *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); 1997 Decision and Order at 4.

Claimant further argues that the administrative law judge did not sufficiently credit the opinions of Drs. Wurst and Gajendragadkar, noting that the administrative law judge never discussed the objective basis for Dr. Wurst's opinion, and adding that Dr. Wurst specifically reviewed the results of testing by Dr. Rasmussen.[2] Claimant's Brief at 21. In addition, claimant states that the reports of Drs. Wurst and Gajendragadkar should be given great weight because these doctors were the miner's treating physicians for fifteen years, a period claimant describes as "lengthy." Claimant's Brief at 21-22. Claimant's arguments amount to a request to reweigh the evidence, which is beyond the scope of the Board's review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). With regard to claimant's point that Drs. Wurst and Gajendragadkar were the miner's treating physicians, we note that in this case, the Fourth Circuit stated that Dr. Wurst's "status as treating physician entitles his opinion to great, though not necessarily dispositive, weight." *Grigg*, *supra*, 28 F.3d at 420, 18 BLR at 2-307. The administrative law judge complied with the Fourth Circuit's holding when he stated, "I have given due consideration that the opinion of a treating physician is generally entitled to great, though not necessarily dispositive, weight." 1997 Decision and Order at 6; *see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

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[1] In his report dated June 16, 1981, in which he found that the miner was totally disabled, Dr. Rasmussen noted that the miner's resting blood gas studies were normal and noted that the miner was in obvious respiratory distress during the exercise testing. Claimant's Exhibit 4; Director's Exhibit 37.

[2] Contrary to claimant's assertion, the administrative law judge noted the objective testing cited by Dr. Wurst in his August 31, 1981 report. 1997 Decision and Order at 4.

Claimant, citing *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991), also renews his argument that the administrative law judge erred in crediting Dr. Daniel's opinion because Dr. Daniel had less than specific knowledge of claimant's coal mine employment.[3] Claimant's Brief at 19-20. Claimant's argument lacks merit. A physician's opinion on the cause of claimant's disability may be credited regardless of that physician's knowledge of claimant's specific coal mine employment duties. *See generally Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-106 (1992); *Rice v. Sahara Coal Co., Inc.*, 15 BLR 1-19, 1-22 (1990)(*en banc*). Further, we have previously held in this case that the administrative law judge was not required to consider whether the degree of Dr. Daniel's familiarity with the specific duties of the miner's usual coal mine employment impacted the reliability of his diagnosis of no respiratory impairment in establishing rebuttal pursuant to Section 727.203(b)(3). *Grigg*, BRB No. 95-0828 BLA, slip opinion at 4 (Oct. 30, 1995)(unpub.); *see Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991).

Claimant also raises the issue of the legal sufficiency of Dr. Daniel's report to establish Section 727.203(b)(3) rebuttal. Initially, we reject claimant's argument that the administrative law judge erred in finding the evidence sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3) in light of the Fourth Circuit's holding in *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 16 BLR 2-1 (4th Cir. 1991). In *Henderson*, the Fourth Circuit held that rebuttal at Section 727.203(b)(3) could not be established in a case in which there was no evidence to suggest a cause for the miner's disability other than his coal mine employment. *Id.*, 939 F.2d at 151, 16 BLR at 2-8. In the instant case, the Fourth Circuit has ruled that Drs. Zaldivar and Daniel identified advanced age and hypertension as alternative explanations for the miner's total disability. *Grigg*, *supra*, 28 F.3d at 420, 18 BLR at 2-307; *see* Director's Exhibits 14, 45, 54.

[3] In *Eagle*, the Fourth Circuit held that in the context of establishing whether a miner is totally disabled pursuant to 20 C.F.R. §718.204(c)(4), a physician who asserts that a miner is capable of performing his usual coal mine employment should state his knowledge of the physical efforts required and relate them to his impairment. *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991).

Claimant further maintains, however, that the administrative law judge erred in crediting Dr. Daniel's opinion of no pulmonary impairment to establish rebuttal pursuant to Section 727.203(b)(3) because Dr. Daniel's opinion lacks a specific causal link.[4] Claimant argues that the administrative law judge has ignored the law of the case in *Grigg* and the precedent of *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993). Claimant's Brief at 9, 18. Subsequent to the administrative law judge's most recent Decision and Order in the instant case, the Fourth Circuit issued its decision in *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, BLR (4th Cir. Mar. 3, 1998). In *Lockhart*, the court explained that rebuttal pursuant to Section 727.203(b)(3) usually takes one of two forms: a causal connection can be "ruled out" if positive evidence demonstrates that the miner suffers from no respiratory or pulmonary impairment of any kind, or if such evidence explains all of any impairment present and attributes it solely to sources other than coal mine employment. 137 F.3d at 804-805. Further, the court stated that "there is a critical difference between evidence of no impairment, which can, if credited, rebut the interim presumption, and no evidence of impairment, which cannot." *Id.* at 805. We hold that the Fourth Circuit's decision in *Lockhart* requires remand of this case. Therefore, we vacate the administrative law judge's finding that the evidence is sufficient to establish rebuttal under Section 727.203(b)(3), and remand this case for further consideration of Dr. Daniel's opinion by the administrative law judge in light of *Lockhart*.[5] *See Lockhart*, *supra*; *Grigg*, *supra*; *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984).

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

SO ORDERED.

ROY P. SMITH

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[4] In its most recent Decision and Order, the Board rejected claimant's assertion that Dr. Daniel's opinion was insufficient to establish 20 C.F.R. §727.203(b)(3) rebuttal under *Massey*, holding that the administrative law judge properly found that Dr. Daniel's opinion supported a finding of rebuttal under *Grigg* and *Massey*. *Grigg v. Director, OWCP*, BRB No. 95-0828 BLA, slip opinion at 4 (Oct. 30, 1995)(unpub.), citing *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984).

[5] If the administrative law judge finds the evidence sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3), entitlement under 20 C.F.R. Part 410, Subpart D is precluded. *See Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge